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No. 04-905

In The Supreme Court of the United States

VOLVO TRUCKS NORTH AMERICA, INC.,

Petitioner,

v.

REEDER-SIMCO GMC, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

JOINT APPENDIX
VOLUME I, PAGES 1 TO 318

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RELEVANT DOCKET ENTRIES

U.S. District Court for the Western District of Arkansas (Fort Smith), Case No. 00-CV-2031 (RTD):

DATE	#	DOCKET ENTRY
2/9/00	1	COMPLAINT w/ jury demand & attachments (1 Summons(es) issued & retd to atty f/svc) (rw) [Entry date 2/09/00]
10/4/01	54	FIRST AMENDED COMPLAINT [1-1] w/attachments by plaintiff Reeder-Simco GMC Inc; jury demand (rw) [Entry date 10/04/01]
12/7/01	56	MOTION by dft Volvo GM Truck Corp for summary judgment (EXHIBITS PLACED IN SEPARATE FOLDER) (ke) [Entry date 12/07/01]
12/7/01	57	MEMORANDUM BRIEF by dft Volvo GM Truck Corp in support of motion for summary judgment [56-1] (ke) [Entry date 12/07/01]
12/7/01	58	STATEMENT OF FACTS by dft Volvo GM Truck Corp in support of motion for summary judgment [56-1] (ke) [Entry date 12/07/01]
12/21/01	65	RESPONSE by pltf Reeder-Simco GMC Inc to motion for summary judgment (EXHIBITS PLACED IN SEPARATE FOLDER) [56-1] (ke) [Entry date 12/21/01]
12/21/01	66	MEMORANDUM BRIEF by pltf Reeder-Simco GMC Inc in support of motion response [65-1] (ke) [Entry date 12/21/01]
12/21/01	67	STATEMENT OF FACTS by pltf Reeder-Simco GMC Inc in support of motion response [65-1] (ke) [Entry date 12/21/01]

1/3/02	70	ORDER by Honorable Robert T. Dawson granting deft's motion for summary judgment in part & denying in part (EXHIBITS PLACED IN SEPARATE FOLDER) [56-1]; further pltf's claims for primary-line discrimination under the Robinson-Patman Act & for tortious interference w/a contractual relationship or business expectancies are dismissed w/prej; further all other claims are set for the jury trial on 1/14/02 (cc: all consel) (rw) [Entry date 01/03/02]
1/14/02	85	CLERK'S NOTES: , ; Jury trial began, day one (hhp) [Entry date 01/17/02]
1/15/02	86	CLERK'S NOTES: Day Two, Jury Trial Continues (hhp) [Entry date 1/17/02]
1/15/02	–	DEPOSITION of Hugh Samuel Johnston taken on the following date(s): 05/22/01 submitted w/trial transcript on 07/16/02 (mfr) [Entry date 07/17/02]
1/16/02	87	CLERK'S NOTES: Day Three, Jury Trial Continues (hhp) [Entry date 01/17/02]
1/17/02	88	CLERK'S NOTES: Day Four, Civil Trial continues (hhp) [Entry date 01/22/02]
1/17/02	–	DEPOSITION of Christopher William Patterson taken on the following date(s): 05/23/01 submitted to court w/trial transcript on 07/16/02 (mfr) [Entry date 07/17/02]
1/17/02	–	DEPOSITION of Robert David Wright taken on the following date(s): 05/24/01 submitted to court w/trial transcript on 07/16/02 (mfr) [Entry date 07/17/02]
1/18/02	89	CLERK'S NOTES: Day Five, Civil Jury Trial Continues (hhp) [Entry date 01/22/02]

1/18/02	–	DEPOSITION of Suzanne Keith Warren taken on the following date(s): 05/22/01 submitted to court w/trial transcript on 07/16/02 (mfr) [Entry date 07/17/02]
1/22/02	91	CLERK'S NOTES: Day Six, Civil Trial Continues (hhp) [Entry date 01/23/02]
1/23/02	92	CLERK'S NOTES: Day Seven, Civil Trial Continues (hhp) [Entry date 01/24/02]
1/24/02	93	CLERK'S NOTES: Jury Trial Ends, Day eight (hhp) [Entry date 01/25/02]
1/24/02	94	VERDICT for plaintiff Reeder-Simco GMC Inc against defendant Volvo GM Truck Corp (hhp) [Entry date 01/25/02]
3/1/02	100	MEMORANDUM OPINION: by Honorable Robert T. Dawson (cc: all counsel) (rw) [Entry date 03/01/02]
3/1/02	101	JUDGMENT: by Honorable Robert T. Dawson re [100-1], granting pltf's motion for award of treble damages [96-1], granting motion for attorney fees and costs [96-2]; that judgment be entered in favor of pltf against deft & pltf is awarded damages in the amt of $513,750.00 f/its claim under the Arkansas Franchise Practices Act; further ordered that pltf is awarded damages in the amt of $4,074,000.00 on the price discrimination claim brought pursuant to the Robinson-Patman Act and as the prevailing party, pltf is awarded a reasonable atty's fee of $171,095.00 & $25,175.42 in costs; further damage awards shall bear interest at the annual rate of 2.24% from 1/24/02 until paid and the reasonable atty's fees and costs shall bear int at the rate of 2.24% per annum

from date of entry of judgment until paid dismissing case (cc: all counsel) (rw) [Entry date 03/01/02]

3/15/02 102 MOTION by defendant Volvo GM Truck Corp for judgment as a matter of law, alternative for new trial or remittitur (rw) [Entry date 03/15/02]

3/15/02 103 MEMORANDUM BRIEF by defendant Volvo GM Truck Corp in support of motion for judgment as a matter of law [102-1], of motion for new trial or remittitur [102-2], w/exhbs (rw) [Entry date 03/15/02]

4/5/02 106 RESPONSE by plaintiff Reeder-Simco GMC Inc to motion to extend time to resp to deft's motion f/judgment as a matter of law and, in the alternative, f/a new trial or remittitur until 4/5/02 [104-1], w/exhb (rw) [Entry date 04/05/02]

4/5/02 107 MEMORANDUM BRIEF by plaintiff Reeder-Simco GMC Inc in support of response [106-1] (rw) [Entry date 04/05/02]

4/26/02 110 REPLY BRIEF w/exhbs by defendant Volvo GM Truck Corp in support of motion for judgment as a matter of law [102-1], of motion for new trial or remittitur [102-2] (msj) [Entry date 04/29/02]

5/1/02 111 ORDER by Honorable Robert T. Dawson denying deft's motion for judgment as a matter of law [102-1] denying deft's motion for new trial or remittitur [102-2] because the damage is not excessive or conscience shocking (cc: all counsel) (rw) [Entry date 05/01/02]

5/29/02 112 NOTICE OF APPEAL by defendant Volvo GM Truck Corp from District Court

decision, re: order [111-1] dated 05/01/02 and final judgment [101-2] dated 03/01/02 (cc: opposing counsel, Rick Congdon, CR) (mfr) [Entry date 05/29/02] [Edit date 05/29/02]

7/8/02 118 ORDER by Honorable Robert T. Dawson granting motion to stay judgment and for approval of attached supersedeas bond [117-1] Case stayed as to execution of judgment until appeal has been completed (cc: all counsel) (msj) [Entry date 07/08/02]

7/8/02 119 SUPERSEDEAS BOND in amount of $4,784,020.42 by defendant Volvo GM Truck Corp, as Principal and Westchester Fire Insurance Compnay as Surety per Order dd 07/08/02 (mfr) [Entry date 07/09/02]

U.S. Court of Appeals for the Eighth Circuit, Case No. 02-2462:

6/6/02 Civil Case Docketed. Dist. Ct. Office: Fort Smith (cah)

6/6/02 CERTIFIED copies notice of appeal, docket entries, memorandum opinion 3/1/02, judgment 3/1/02, order 5/1/02 (assigned to dgh) [02-2462] [1526204] (cah)

7/19/02 RECORDS received: Transcript, consisting of 6 Volumes of trial held on 1/14/2002 – 1/23/2002 – vols. I, II, III, IV, V, and VI. Location STL. [02-2462] (stl)

7/19/02 RECORDS received: 4 vols. of Deposition. (1 vol. of Robert David Wright held on 5/24/2001, 1 vol. of Suzanne Keith Warren held on 5/22/2001, 1 vol. of Christopher William Patterson held on 5/23/2001, and 1 vol. of Hugh Samuel Johnston held on 5/22/2001) Location STL [02-2462] (stl)

7/19/02 RECORDS received: Miscellaneous Records, consisting of one envelope containing Jury Instructions. [Return to Dist. Ct. at end of case] [02-2462] (stl)

7/30/02 RECORDS received: Transcript, consisting of 1 Volume of pretrial heairng proceedings held on 1/14/2002. Location STL. [02-2462] (stl)

4/15/03 ARGUED AND SUBMITTED IN ST. LOUIS TO JUDGES Kermit E. Bye, Circuit Judge, Richard S. Arnold, Senior Judge, David R. Hansen, Senior Judge. Michael N. Shannon for Appellant Volvo GM Heavy Truck. Edward J. Kionka for Appellee Reeder-Simco GMC. Rebuttal by: Mr. Shannon. RECORDED. [02-2462] (skh)

7/12/04 THE COURT: Kermit E. Bye, Richard S. Arnold, David R. Hansen. OPINION FILED by Kermit E. Bye, Authoring Judge. PUBLISHED. CONCUR and DISSENT by David R. Hansen. [02-2462] [1786824] (dmh)

7/12/04 JUDGMENT: Kermit E. Bye, Richard S. Arnold, David R. Hansen. The judgment of the lower court is AFFIRMED in accordance with the opinion. [02-2462] [1786832] (dmh)

8/9/04 PETITION for REHEARING with petition for rehearing en banc. Filed by Appellant Volvo GM Heavy Truck, w/service 8/9/04., TO COURT. [02-2462] (dms)

8/9/04 MOTION of amicus curiae, Truck Manufacturers Association, for leave to file an amicus curiae brief in support of appellant, Volvo GM Heavy Truck Corporation's, petition for rehearing en banc; [1798504] TO COURT; w/service 8/6/04 (dms)

8/9/04 BRIEF TENDERED – Brief of Amicus-Curiae (Truck Manufacturers Association) – in support

of appellant's petition for rehearing en banc. – w/service 8/6/04. (dms)

8/27/04 Clerk letter sent notifying that party has an opportunity to respond to petition for Rehearing with petition for rehearing en banc filed by Volvo GM Heavy Truck [1798486-1] [02-2462] Response due by 9/7/04 (dms)

9/7/04 RESPONSE to petition for Rehearing with petition for rehearing en banc filed by Volvo GM Heavy Truck [1798486-1] [1809338]. Response filed by Reeder-Simco GMC. w/service 9/4/04. TO COURT. [02-2462] (dms)

10/6/04 JUDGE ORDER: The motion by the Truck Manufacturers Association to file an amicus brief has been considered by the Court and is denied. The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge Gruender would grant the petition for rehearing en banc. Judge Hansen would grant the petition for panel rehearing. [1798486-1] [02-2462] [1819125] [1798504-1] [1819125] – Published Order. (dms)

10/13/04 MOTION of aplnt, Volvo GM Heavy Truck, to stay mandate. [02-2462] [1821181], TO COURT. w/service 10/13/04 (paw)

10/19/04 RESPONSE of aplee, Reeder-Simco GMC, in opposition to appellant motion to stay mandate filed by Volvo GM Heavy Truck [1821181-1] [02-2462] [1824540]. TO COURT. (dms)

10/19/04 MOTION of aplee, Reeder-Simco GMC, for leave to file attorney fees out of time. [02-2462] [1824664], TO COURT. w/service 10/19/04 (dms)

10/19/04 DOCUMENT TENDERED: Application for Recovery of Attorneys' Fees on Appeal (untimely); Document rec'd in St. Louis [02-2462] (dms)

10/26/04 REPLY filed by Volvo GM Heavy Truck regarding motion to stay mandate; TO COURT. [02-2462] [1827014] (dms)

10/27/04 RESPONSE of aplnt, Volvo GM Heavy Truck, in opposition to appellee motion file attorneys' fees out of time and motion for recovery of attorneys' fees filed by Reeder-Simco GMC [1824664-1] [02-2462] [1827040]. TO COURT. (dms)

11/17/04 JUDGE ORDER: denying appellee motion file attorney fees out of time [1824664-1] filed by Reeder-Simco GMC [02-2462] [1835014], granting appellant motion to stay mandate pending the filing of a petition for writ of certiorari. [1821181-1] [02-2462] [1835014] (srd)

In the United States District Court
Western District of Arkansas
Fort Smith Division

Docket No. 00-CV-2031 (RTD)

Reeder-Simco GMC, Inc.,

Plaintiff,

v.

Volvo GM Heavy Truck Corp.,
n/k/a Volvo Trucks North America, Inc.,

Defendant.

Transcript of Proceedings

January 14, 2002 through January 24, 2002

[Testimony of William E. Heck]

[17] A Yes.

Q Let me direct your attention there to Plaintiff's Exhibit No. 1.

A Yes, sir.

Q You recognize that?

A Yes, I do.

Q What is that?

A That is the Dealer Sales and Service Agreement that we signed in 1995.

MR. BYARS: Your Honor, we move for the admission of Plaintiff's Exhibit 1.

MR. WILLIAMS: No objection, Your Honor.

THE COURT: Be admitted without objection.

Q When this agreement was signed, Bill, what was your understanding of the term of the agreement, how long it lasts?

A The agreement contains language to the effect that it starts out as a five-year agreement, and then every time a year goes by, another year is added at the end of it, so it's always five years. It would, you know, first of all, it would expire say in 2000. Then the next year it would expire in 2001 and so it was always to be a five-year agreement.

Q Let me direct your attention to page 15. That's also section 5.01 of the agreement.

A Okay. Well, that's the five years. You want me to read that or –

[18] Q Yes, if you could indicate – you're talking about this language here that deals with the term. If you would read that paragraph, please?

A The agreement shall be for a term specified in the Term addendum subject to an Annual Performance Review. Unless otherwise stated in the Term Addendum, the term of this agreement shall be for five years. Each year the company shall conduct an Annual Performance Review of the dealer. If the dealer has met its obligations under this agreement including the Portfolio of Criteria, an additional one year shall be added to the term so that the term shall be continuously five years. If the dealer has failed to meet its obligation under this agreement, or the Portfolio of Criteria, the company may, at its option, refuse to modify the term stated in the Term Addendum so that the term decreases by one year for each year of such

failure or replace the Term Addendum with a Probationary Status Addendum of a shorter term.

Q All right. Let's look at the initial Term Addendum on this agreement.

THE COURT: Holly, you want to get those marks off?

Q Which is on page 29.

(Off the record at this time.)

A I'm sorry, Joe. Where did you direct me to?

Q It's page 29 of the agreement and that's entitled Term Addendum. This was the – what was this?

[19] A That came along with the Franchise Agreement in 1995, and it states what we've said.

Q And this is talking about this expiration date here. That' what was included in the agreement?

A Yeah. That's it, March 31st, 2000. Started April 1st, 1995. March 31st, 2000.

Q All right. Bill, what is your understanding of Volvo's obligations under this agreement?

MR. WILLIAMS: Your Honor, I think he just asked, if I understand, what Volvo's obligation is under the agreement. I think he's calling for a legal conclusion, and, of course, the document speaks for itself. I don't think Mr. Heck can characterize –

THE COURT: Well, I think he can summarize it, if he's in a position to do it. Your objection is overruled. I'm going to listen to some of it.

Q Let me direct your attention to page one of the agreement, and if you would look at what the dealers look to Volvo for.

A The dealers depend upon the company to provide a variety of competitive quality products and services and also provide effective sales, parts, and service support.

Q Did the 1995 Franchise Agreement with Volvo provide for the assignment by Volvo of sales objectives?

A Yes.

Q All right. And what was that called under this 1995 [20] agreement?

A I believe it was called a Portfolio of Criteria is that section we read.

Q And who was it that assigned the new sales objectives for Reeder-Simco?

A The District Sales Manager.

Q Okay. Did you know that before this lawsuit?

A Well, I knew that. I didn't know how or – I knew that the did it.

Q All right. Did Reeder-Simco participate at all in the determination of the sales or purchase objectives?

A No, not in the creation of them. We had to accept them.

Q Okay. And tell me how that process worked.

A Well, the way it works, the sales objectives, and there's some other things in there, the purchase objectives are provided to the dealer sometime in the spring or early

summer for the year that you're already in, and it's been done over this timeframe in many different ways. Sometimes the District Manager would bring it in and ask you to sign it. Sometimes the Parts District Manager would bring it in and ask you to sign it. Sometimes they would mail it to you and ask you to mail it back. That was about the extent of it.

Q All right. Bill, would you just describe the function of a franchise dealer?

A A franchise dealer agrees to provide services for customers.

* * *

[22] A Okay.

Q Did you begin to see – what was it about what Volvo did that indicated to you that they wanted you to fail?

A Well, I didn't, in different circumstances, receive the proper pricing so that I can obtain sales and be able to order trucks and fulfill my objectives. And I came to believe that other dealers were able to obtain sufficient price discounts to be able to obtain their level of business they needed to survive and those same discounts weren't available to me.

Q Where does Reeder-Simco look to make its sales in heavy trucks?

A We're restricted to the continental United States, 48 states.

Q Okay. So tell me about Reeder-Simco's actual customer base. Tell me some states where Reeder-Simco has sold or delivered Class 8 heavy trucks.

A Okay. Arkansas certainly, Oklahoma, Texas, Missouri, Iowa, Illinois, Minnesota, Ohio, Pennsylvania, North Carolina, Georgia, Colorado, Oregon.

Q What is the process that Reeder-Simco had to go through in quoting a fleet customer for a Volvo heavy truck under this 1995 Franchise Agreement?

A Okay. Of course, you would establish the relationship of the customer so that they would ask you to give them a price. That's kind of where it starts. And you have to provide [23] assistance in specifying the vehicle. Some customers are very sophisticated. They have a bid list already prepared. They say this is what you have to bid, so you respond to their bid list. Other customers may be not so sophisticated, want some advice or maybe that, so the first thing you do is you create specifications, you then compare the specifications needed to see what's available in Volvo, and that means you have to pick the right model and start seeing if the things can be selected that meet the customer's needs. And that's what the data book was for. The data book was paper. Then it went to a CD rom that you could use on a laptop. Currently the data book resides on a mainframe at Greensboro so to spec out a Volvo truck now you have to be on a computer that can get on the Internet, so once you have the specifications created, you then reduce the price to dealer net which is the list price times 80 percent or a 20 percent discount, so in the case we saw a hundred thousand dollars, the list is $80,000. You would fill out a form before. Now we type it into the computer. It's just a way of communicating it. And you tell

them, you know, what the net price of the truck is and you tell them who the customer is, where they're located, the size of the transaction, you know, be it ten trucks, five trucks, one truck, doesn't matter. You tell them. What is the finance source, you know, be it cash, you know, who's going to finance them? You tell them the competitive situation, you know, who else are you bidding with? Are you [24] bidding against Freightliner, Navistar, Peterbilt, Kenworth or any of those customers or competitors. You tell them what the engine model is, what the transmission is, what the rear axle is, what the tires are, and I think that's most of it. You also have a way to give them a brief sales history, and say, hey, we've never sold this customer before, or, you know, this is another bid for this year. We've already sold them something, et cetera et cetera. So then you submit that, and then depending upon whether it was a fax system, under the fax system, you know, a day later, four days later, you would get a response back. In the meantime you're trying to get your customer to understand that he can't have a price when he asks you for it. You know, he says, okay, we've got this truck figured out. You how much is it? You've got to say, well, give me a chance here to try and get you the best deal possible. So you send in your request, wait a little while, you get it back. And then now this happens on the computer. So when you type this data into the computer, it goes in. You check it every day. It doesn't come back to you automatically. It's just unavailable. So you have to look for it. You go in and see if it's been approved yet. And when it's approved, you obtain this concession percentage that has been mentioned to you already, which is an additional discount from what would normally be dealer price.

Q Bill, let's show the jury an example of what are one of these forms. I'll refer you to Plaintiff's Exhibit No. 143 and [25] I ask that this be admitted into evidence.

MR. WILLIAMS: No objection, Your Honor.

THE COURT: Be admitted without objection as 143.

Q Okay. Mr. Heck, what is Plaintiff's Exhibit No. 143?

A This is a special price confirmation which is, you could call it, a concession request that we submitted this particular version on February 14th, 1998, to obtain a further discount than what we would have from dealer price so that we could sell trucks to Danmarr Transit.

Q Now, in looking at this particular form for Danmarr Transit, where is it that you requested – what was the concession about that you requested?

A Well, there's a hole through it, but it would be line 15 here it says C O N C dot R E Q, and I think I can make this thing. It's that right there. You see that? My concession request is 7.84 percent. And I might tell you the numbers that are important on this, and there's Vaughn Drum's name. There's ten, you know, quantity ten. There's the model description which is required. The chassis, that's the dealer net price of the chassis that was in existence when this quote was prepared. The options. That's the dealer net price of the options, so if the truck had less equipment, that number would be lower. If it had more equipment, then it would be higher. And then the total is simply the sum of those two numbers. And we've got to consider at this point that this is only the price of the truck and the [26] equipment. It's not the freight or

any of the other various things that we have to include. Quarter year delivery, No. 12, that's February of 98. No, that's second. I'm sorry. I misspoke. That's the second quarter of 1998. So we're in February, so we're saying we expect to be able to deliver these trucks in the April/May/June timeframe and the year model of the equipment will be 1999. And the data book price level, whether it's paper or electronic, is pricing as of 2/1/98, and then we asked for an additional 7.48 discount from what normal dealer prices would be.

Q Now, Bill, when you make these concession requests, do you ask for a dollar amount or a percentage?

A You request a percentage.

Q Okay. And why is that significant in this case?

A Well, because the percentage is so that the specifications of the truck can change without you having to go back through this whole process. In other words, the customer at this point, he doesn't know if the price of that truck is going to be within his reach. So he may wish to forego some item of expense on the truck that he thought, well, I'll just see how much that special fuel filter costs, and if it's too much, I'll just leave it off. So when you put in your concession request, you're trying to forecast as best you can, you know, what the customer is actually going to buy, but the percentage allows you to know how to price that fuel filter. In other words, if they just give you $5,000 [27] or $2,000, and then if you ordered that truck, and it didn't have the content that you had told them it was going to have, you would not be honest about it. You know, if it was less truck than what they thought you were going to have, and they gave you $3,000, and maybe they should have only given you $2,800, and it would also be extremely

difficult with dollars to have any kind of parity between dealers, because two dealers might be able to interpret the specifications differently. You know, one might take the guy's specification one direction. Another one might just have a little bit of difference over here. That's why –

Q Well, the prices – all of these specifications have their own prices, don't they?

A They have their own list price.

Q Okay. And so if you've got a difference between the pricing and the various options, how does that interplay with the percentage? You know, you're requesting a percentage discount with Volvo, aren't you?

A Yes.

Q Okay. So if you have a difference in a certain brand of option, for example, they're already price different, is that correct?

A Yes. And you apply the percentage, you know, whether it's an engine price of, you know, $3,000 or a different engine at $2,950, you would net them down to dealer price and then take that same percentage on both engine options. You know, that's [28] the reason why it's a percentage and not a flat dollar amount.

Q Okay. Now, in this particular example you've got, how did you come up with 7.84 percent?

A The explanation is down in the comment section, if you would raise that up so that we can read that . . . Okay. This is not the first, first concession request, you know, I'll try to stay with that description the whole time.

Q All right.

A This is not the first concession request for this transaction to sell Danmarr Transit. We had already requested concession, and as it says below, it says comments. It says quoted trucks to customer and that's $72,770 and that price includes 12 percent federal excise tax, and it includes whatever it takes, you know, to get it to the customer. If we have to do something, a little something in the shop, you know, that's what we priced it to him for including the taxes. We were keeping $2,000 profit for ourselves. We were contemplating buying 30 days floor plan from the factory. And using the four percent concession that's been approved earlier, Dan, who is the Dan Bearden in the DanMarr, you know, it's Danmarr, which is Dan Bearden, Dan informed me that he could buy Prosleepers, which is an international product in stock for less than $70,000. So he's saying, hey, you know, at this price I'm not buying from you, you know, I need – and, you know, he said that he would pay $70,000 for our trucks. And then he gave me a chance to get to the [29] $70,000. So I figured the deal backwards, you know. I knew it was $70,000 and I took it backwards so that I could decide what concession percentage was required so that I could sell it for $70,000, and that's how come I asked for 7.84. Ordinarily, I'm not smart enough to know what the hundreds of a tenth or hundreds out there ought to be. You know what I'm saying? But this is exactly what it takes to sell that truck in that circumstance.

Q All right. So you first submitted a concession request and whose signature is that?

A That's Mike Truta.

Q All right. What, out of your first request, did he approve?

A As I recall, it was four percent.

Q Okay.

A Because that's how we quoted it.

Q And then out of your request for 7.84, what was finally approved?

A 5.6 percent.

Q All right. And was that enough to get the deal –

A No, sir.

Q – in this case?

A No.

Q Let me have you now look at Exhibit No. 240-A. I move for the admission of 240-A.

A Okay.

MR. WILLIAMS: No objection to 240-A, Your Honor, at [30] this time.

THE COURT: Be admitted without objection as 240-A.

Q Mr. Heck, what is this document?

A This is a printout that we derived from information we received from our, I believe you call it discovery process, where Volvo made available to us sales data from what they termed the Southwest Region, and were able to extract that information from what they provided.

Q All right. And you see the dealer net here, this column? What does that represent?

A That dealer net is the total of the base model and the options as was listed on the previous concession quote. You know, if the base model was $60,000 and the options were 7,011, that's what that number is. That's just the sum of that, you know, those two numbers.

Q And –

A That's the dealer net.

Q What was the concession amount for this – well, does this printout reflect what another dealer got for sale to Brookshires Grocery?

A Yes, sir.

Q What was the concession percentage on this transaction?

A 12.3 percent.

Q And you see this column here that says postmark date?

A Yes.

[31] Q What is the postmark date?

A February 26th, 1998.

Q Okay. What is meant by a postmark date?

A Well, the postmark date is the date that the factory receives the Order by whatever means they receive it, and by that I mean that at one point in time they were mailed and at another point in time they were faxed. Currently it's an electronic submission. You put the electronic truck order on the computer and it's instantaneous

for all practical purposes, but that's the first date that the factory knows that the dealer wants this truck.

Q All right. And how does that correspond to the Danmarr Transit at the time you requested this concession for Danmarr Transit?

A Well, you notice on February 14th we sent in and advised them that we needed the 7.84 to be able to sell these 10 trucks. And then over on the right hand side there's some date. I can see it a little easier on my copy here. It says faxed back to dealer on and it says 2/16/98 and 2/26/98, so all things being equal, you know, if there weren't some other, you know, delays, I don't recall what day of the week that was, but we would have ordered these trucks quite possibly on 2/26/98. Because once we had the number agreed to, Mr. Bearden had already agreed to buy them for that.

Q Now, let me have you look at Plaintiff's Exhibit No. 240. [32] What is this?

A This is –

MR. BYARS: We move for the admission of 240.

THE COURT: Any objection?

MR. WILLIAMS: Just a minute, Your Honor. I don't have it – haven't seen it yet. (Pause) No objection, Your Honor.

THE COURT: It will be admitted without objection. I also think, Mr. Byars, you maybe can make that a little larger, too, on your copy.

MR. BYARS: Yes, Your Honor. Would you explain what this is, Mr. Heck, Exhibit 240?

A 240 is the equivalent of a factory invoice. This is data that was provided as a result of our lawsuit by Volvo, and we had the ability to extract information from that database, and this is a printout that we obtained, and it shows some identifiers over here and so forth. You want me to run through it?

Q Well, what I would like to have you point out is this is an invoice to another Volvo dealer, is that right?

A Yes, sir. This is, this is Barrett Truck Center that I happen to know is in Tyler, Texas. It's Bill Barrett.

Q And the postmark date shows up on this invoice, is that right?

A Yes, it does.

Q That's the date that the trucks were ordered?

A Right, line 17; yes.

[33] Q Okay?

A Yes.

Q And on this invoice, what did this dealer purchase?

A Well, he bought a VNL 64 T and then the cab style on this one happens to be on the second page, so it's a 420. Back at this point in time the 420 was not necessarily part of the model number. It was a VNL 64 T, which was described a tandem VN which is a nice truck, and the 420 sleeper. And it's saying that the base chassis price – see the list there 70,298, and then the dealer net is 56,238.

Q All right.

A Which you could come to our request on line nine where we stated our chassis price to be 56,238.

Q So that the chassis price and your request on your quote to Danmarr Transit is the same chassis price that's shown on –

MR. WILLIAMS: Your Honor, about three times I've heard this and I didn't object, but I'm objecting now. That's leading.

THE COURT: Yeah, try not to lead, but I think he's trying to expedite matters somewhat, but try not to lead.

Q Okay. You're pointing out on the invoice to the other Volvo dealer the same concession price?

A No, it's not the same concession. It's the same base model.

Q I'm sorry.

A And the concession amount at this point in time on this invoice it shows zero, and I might mention down here on line 34 [34] and 35, you need to push that up a little bit, the concession amount is zero at the time this truck was invoiced. Then you go to the back and the line number 163, it's one, two, it's the fifth page, the concession amount is the 8242, which calculates out to the 12.3 percent, 12.3 percent.

Q So this other Volvo dealer using the same model, same model year, same chassis price, received a 12.3 percent concession?

A Sure. Yeah.

Q And you were approved for?

A 5.6 percent.

Q All right.

A So it makes the – makes most of the difference in the price of the trucks go away.

Q All right. Why would, why would this other dealer get a higher concession?

MR. WILLIAMS: Objection, Your Honor; calls for speculation.

THE COURT: I think it may, but I'm going to let him answer if he knows. Do you have any way of answering that?

A I can't specifically tell you that.

THE COURT: I will sustain your objection.

Q Before this lawsuit was filed and we obtained any information such as this, did you have – were you suspecting that there were differences in concessions being granted to other Volvo dealers?

[35] A Yes.

Q All right. And how did you suspect that?

A Well, the two main reasons, when they were faxing the concession approvals back to the dealers over a fax machine, they must have used some fax in Greensboro where the operator could hit the wrong button and we would receive other dealers' concession requests on occasion. And they did not – they were higher, you know, they

appeared to be higher levels than what I was used to getting, and that got me to starting to wonder.

Q All right.

A And then the other main reason is I couldn't find out why we weren't more successful in selling these trucks. Had to be some explanation.

Q What did you do with those concession requests that were faxed back to you?

A Oh, some of them I faxed them back to Greensboro. I didn't want to get the person in any kind of trouble. And I just threw some of them in the file, and some of them after I – you know, some of them I faxed to the correct dealer, you know, because I would read them, and if the thing was due right away or, you know, looked like they had been waiting for it, I would just fax them on to them.

Q And when did you start recognizing that?

A I can't be sure exactly, but somewhere in this timeframe.

Q The 1998 timeframe?

[36] A Yeah, 97, 98, 97.

Q All right.

A 98.

Q Is there anything that happened in 1997, 1998, which made you believe that Volvo was not dealing with you in good faith or in a commercially reasonable manner?

A Yes. 1997.

Q What happened in 97?

A Well, they sent us a notice of a – put us on probation.

Q Okay.

A Yeah.

Q What else did you receive in late 97?

A Well, in late 97 we got a memo, a memo – Volvo has an electronic communication system where you can e-mail back and forth, but it's not like e-mail. It just appears. And you can read it or not. If you don't do anything with it, it will just stay there. And once you delete it, it's gone. You know, you read it. If you want to get rid of it, you can get rid of it. If you leave it there, it will stay there for two years. So we got a memo over that system that described the Volvo Vision.

Q All right. Let me have you take a look at Plaintiff's Exhibit No. 101.

A Okay.

MR. WILLIAMS: Your Honor, we object to this document.

THE COURT: Let's approach the bench, please.

[37] MR. WILLIAMS: Thank you, Your Honor.

(The following proceedings were had at the Bench between Court and Counsel, and out of the hearing of the jury:)

MR. WILLIAMS: If I can show it to Your Honor, it's 101. This is a Reeder document from Reeder-Simco.

This is an incomplete document. They're trying to put only part of it in. It says "due to the 2000 glitch" . . . It's a multi-page document. They are putting in one sheet of it and that's not fair. They've got to put in the whole document in.

THE COURT: Where's the rest of it? Do you have the rest of it?

MR. BYARS: Judge, this was – when it came in –

THE COURT: The way it came in from where?

MR. BYARS: The way it came in from Volvo over the electronic submission. Bill Heck made a copy of this page and he kept a copy of this page.

THE COURT: But you're telling me this came from Volvo as opposed to –

MR. BYARS: Yes, Your Honor.

THE COURT: I tell you what I will do, though, on Exhibit 101. I will let you voir dire on it, sir.

MR. WILLIAMS: Okay.

(The following proceedings were had within the presence and hearing of the jury:)

THE COURT: I'm going to permit you to voir dire on [38] Exhibit 101, should you desire.

MR. WILLIAMS: Yes, Your Honor. Thank you.

VOIR DIRE EXAMINATION

BY MR. WILLIAMS:

Q Mr. Heck, looking at Exhibit 101, you can identify this document by the Bates number, this is a document that came from Reeder-Simco's files, is that correct, sir, looking at the bottom?

A I don't see the R S there, but it probably did. 2004, is that one of our numbers?

Q I believe that is, Mr. Heck. Do you have any reason to dispute that right now?

A No, I just don't know.

Q Okay. Thank you. And this document, I don't want to get into the content of it, but I want to ask you about the document. This is something as best I can make it out, you tell me if you disagree. This is part of a multi-page document. Would you agree with me, sir?

A Yes, I would.

Q Okay. And do you have the rest of this document?

A No, sir.

Q And this document was dated or it came to you, if I see it correctly, this is in January of 1998, is that correct?

A That was the date this document was printed out. Yes.

Q Okay. And you've already testified that it was at that time [39] you were already suspicious about Volvo, correct? It was in 1997 that you got suspicious?

A I'd say that's fair.

Q Okay. So we have a multiple page document which now we only have one page from it. Is that correct?

A Yes.

Q What happened to the other pages to this?

A I don't know.

Q They were in your control and possession, is that correct?

A If I got all of them. I can't tell you why the rest of then are missing.

Q Looking at this document, you're much more familiar with these than I am, I'm sure. At the top it says page. Is that saying page three or page 13?

A I suspect it's saying page 13.

Q Okay. So we are on the 13th page of a 13-page document and all we have is one page. Whatever came before, we don't have before us, correct?

A That's correct.

Q And whoever was saying whatever in this document, other than what's on this page, we don't have that and you don't have that in your evidence today, is that correct?

A I don't have evidence as to the previous 12 pages.

Q Okay.

MR. WILLIAMS: Your Honor, we do object to this. I [40] mean they have got a brief part of a document.

THE COURT: Let me ask you this: Who did the document come from? Was it generated by Volvo?

A Yes.

THE COURT: Do you know how you obtained it?

A I believe Barbara Rosetti gave it to me.

THE COURT: And how would she have given it to you, just handed it to you or –

A Yes, she came and visited us. She had called it to my attention, but, see, the destination on top, it says destination the destination is Barbara Rosetti.

THE COURT: Who is Barbara Rosetti? I'm apparently the only person in the courtroom who doesn't know who she is.

A Barbara Rosetti is a Volvo – at the time she was the Dealer Development Manager for the Southwest Region. She was working is Greensboro, North Carolina, and by the date of this letter we had already had discussions and correspondence back and forth with Barbara Rosetti.

THE COURT: So you don't know if you have the other 12 pages or if that's the only page you've got?

A I'm certain I don't have the other 12 pages.

THE COURT: Did you ever see the other 12 pages?

A I think I may have. I can't tell them what this is in reference to, though, right?

THE COURT: Where would the other 12 pages be, or when [41] would the 13 pages be now? Would Volvo have a copy of that in their file?

A Should. Well, no, I can't speak to how long they keep their records. I don't know.

THE COURT: Okay. What's the date on it?

A The date on top is maybe January 7th or January 2nd of 1998. So it's approximately three years old.

MR. WILLIAMS: Your Honor, if I might, one more follow up question?

THE COURT: Yeah, one more.

MR. WILLIAMS: Thank you. Well, maybe more than one.

Q This says – this is also is like a title at the top. It says December 97 update. Do you see that? On the document it was referring to 97 December update?

A I see that's the title of it.

Q Right. Did you get periodic updates from Barbara Rosetti about dealer matters on a periodic basis where she would send out to the dealer body, dealer principals such as yourself, memos in electronic in this form somewhat like an e-mail now?

A Not on a regular basis; from time to time. This was in reference to something.

MR. WILLIAMS: Your Honor, we would stand by our objection.

THE COURT: I'm going to admit it over your objection. Be admitted as Plaintiff's Exhibit 101.

[42] CONTINUING DIRECT EXAMINATION

BY MR. BYARS:

Q Mr. Heck, you received – this is a copy of an electronic message – would you just explain what this electronic message system is between Reeder-Simco as a dealer and Volvo?

A It is, it is a form of electronic mail. It's very similar to e-mail. I have an address. My address is 5711DO1. And I can send electronic mail to Miss Rosetti or anyone else at Volvo. There's a directory. You can look it up. I can send e-mail to another dealer and they can correspond with me. It's e-mail. It's just a form of e-mail.

Q And Barbara Rosetti with Volvo, was she with Volvo at the time that you received this document?

A Yes, sir.

Q And up here at the top it says the Volvo Vision was discussed, is that correct?

A Right.

Q Everybody see that?

THE COURT: If you have to make it larger, you can.

Q And there's two columns. One column on the left says Volvo Challenge and the column on the right says Volvo Vision, is that correct?

A Yes.

Q Under Volvo Challenge it says too many dealers, is that right?

[43] A Yes.

Q Under the column that says Volvo Vision, fewer dealers, larger markets?

A Yes.

Q And on the Volvo Challenge, under-performing dealers, dealerships, low profitability, under four percent net goal. What did you understand that to mean?

A Well, under-performing dealers meant that obviously they thought the dealers should be doing a better job than some of them were, and at the same time the dealers had lower profitability than what they expected a dealer to have. That's what that meant to me.

Q Okay. In other words – well, look at the Volvo Vision. We've got consistent profitability, four percent.

A Right.

Q What did you understand that to mean?

A Well, in my experience what – well, what I understood that to mean was that they wanted their dealers to consistently be at the four percent net profit.

Q And what is that?

A That means that on revenue, you know, if your revenues are going to be a million dollars, your profit should be 4 percent of that net.

Q All right.

A And you know, again, this is – we had already been involved [44] with Miss Rosetti, and I'm, I'm – at this point I'm a little concerned about how the challenge is that the dealers are not profitable and I'm considering part of this poor profitability to be the fact that the trucks are not priced correctly to me, so I can't obtain profitability. Now, that's where I'm starting to understand I think.

Q And under the Volvo Challenge, it says average market size 1100?

A Yeah, and then –

Q And then the Volvo Vision was a market size of 2500?

A Right.

Q What did you take to that mean?

A Well, what that says is that they didn't want, dealers in small markets, but I tend –

MR. WILLIAMS: Objection, Your Honor. I think he's speculating now.

THE COURT: Well, he may be, but I'm going to let him – he's vice president of the company he can testify what it meant to him. Your objection is overruled.

A Well, it says the average market size 1100 is a challenge. And the vision is 2500 market size. So you would have to eliminate dealers to raise the market size.

Q Under the Volvo Challenge it says owners now 146 and the Volvo Vision says Vision, 75. What is your understanding of that?

[45] A Excuse me?

Q What is your understanding of that?

A Well, says right now, which was 1998, you know, December 1997. There's 146 owners, and the thing to keep in mind is that this is owners. This is not necessarily dealer points. you could have an owner that might have two locations or more. And so their vision, their plan was to have the number reduced from 146 to 75.

Q Then you have the Volvo Challenge of full-line dealers 169 and the Volvo Vision of 175. What would you take that to mean?

A Well, again, they're reporting that the current 146 owners are operating 169 points, so, again, some of the owners have more than one point, and their vision is that they have 75 owners and they operate at 175 points, so that would reflect a growth in dealer points of six, you know, from 169 to 175. You'd have to have six more locations to be able to do that, but you would have fewer owners.

Q All right. And that was part of a, says December 97 update? What was your understanding? I mean is this – was this a type of e-mail that you would receive updating dealers on current events or current meetings of Volvo?

A It's more a meeting summary. In other words, it would, you know, give you an update of any meetings that had took place in – see by the wording in and of itself it says the Volvo Vision was discussed. So at some meeting they're referencing [46] they discussed the Volvo Vision. And we heard more about the Volvo Vision. This is not the only, you know . . . This is not it.

Q What else did you hear about the Volvo Vision?

A Well, you know when I got this, you know, we thought it was, you know, something we weren't used to seeing, and then I went to a – there was an annual dealer meeting held in Marco Island, Florida, in early March 1998. And Volvo dealer principals were invited. I believe you could take, you know, like a general manager along if you wanted to, and it was a kind of an annual, you know, get together to, you know, tell you what was going on. Ordinarily what they would do is pep you up and tell you about some new ideas and what you need to get back and sell more models. GM does the same thing, you know, get you revved up. And that's usually what they are for. But the March meeting in Florida was quite different.

Q Would you explain what you heard, what went on at this meeting in Marco Island?

A At Marco Island it was one of the first times I had seen Mark Gustavson. Mark Gustavson was the – I'm not sure. I think he was a president, but he was, he was the lead man for Volvo Trucks North America or it might have been Volvo GM, probably Volvo Trucks North America, and he gave a keynote speech and there were two other speakers there as well. This was more than a one-day meeting. I think it lasted three or four days. And there were two other speakers. One of them was a fellow by the [47] name of Lou Kaysich (phonetic), who was a mountain climber, and the other one was a University of Michigan football coach. I believe his name is Mr. Carr, but at that time he wasn't a football coach. And I was looking forward to his talk because I'm a U of M alumni and –

Q What was the message by the mountain climber?

A Well, that was, that was when – the mountain climber, in 1996, in May of 1996 there were very many what they call commercial expeditions to climb Mount Everest and a lot of people died. And this man, Kaysitch (phonetic), he got within about a hundred meters of the summit of Mount Everest and he thought that that summit was the goal of his life, you know, he wanted to do that. And he wrote a book called "Into Thin Air" and described in the book as well as in this speech that when he was within that hundred meters and I don't go too deep –

THE COURT: I don't think we are going much further. I've read "Into Thin Air" and I've been cold ever since, but were you going to ask him what Mr. Gustavson said or whatever at some point?

MR. BYARS: Yes, Your Honor, but I think the message from this speaker has some relevance in this.

A I'll cut right to the chase.

THE COURT: I'd like to hear it.

A He said you got to give up sometimes. You know, you just got to learn to give up before you achieve your goal. That was [48] his message.

Q All right. And what about the football coach?

A Same thing. He said you had to learn to accept defeat and lose.

THE COURT: Was this a real uplifting meeting you were at? Go ahead. Let's talk about Mr. Gustavson now.

Q What did Mr. Gustavson say? Who was he.

A Well, he was the president. He's the head guy.

Q What did he say?

A He said pretty much the same thing reflected in this memo. He said the Volvo vision is, you know, we're going to get – 50 percent of the dealers are going to be out of business in two years, you know. He said a lot of things, but not to get into long story, you know, he said the ones that are going to survive are going to have to learn how to salute the flag, you know. I don't agree to that. You know, I salute one flag. The flag he was referring to wasn't our flag.

MR. WILLIAMS: Your Honor, I'm objecting to that. He's now getting into argument and speculation.

THE COURT: Well, I'm sustaining that objection. Do you have other questions of this witness before we take a break? Ladies and gentlemen of the jury, we're going to take – I'm almost afraid to ask. Do we have any smokers on the jury? I'm not fussing at you. I just need to know. None? Okay. We then will take about, oh, let's do about an 18-minute break. Every [49] clock in this building has a different time, so – but if we can, let's try to work on this one, and I think if we can be back at five after, that ought to be 18 or 19 minutes. We're going to remain seated until you're out of the room. Remember the previous admontion of the court, to not discuss it with anyone or allow anyone to discuss it with you. Have a nice break and we'll see you in 18 minutes.

(Jury leaves the courtroom at this time. The following proceedings were had outside of the presence and hearing of the jury:)

A Can I take a break, too?

THE COURT: Yeah, just a minute. Yeah. Let the record reflect that the jury is out of the room. Anything anybody needs to put on the record with the jury out of the room?

MR. WILLIAMS: Your Honor, just to make my record on the Exhibit, I believe it was –

THE COURT: 101?

MR. WILLIAMS: 101. I offer to renew my objection and move to strike the Exhibit on the grounds that the Plaintiffs appear to be – have – intentionally are not engaged in spoilation of evidence. They have a 13-page document which I think the context clearly would have added something to the meat of this and that they should have had in there. There is an inference which should be drawn from their failure to produce the document.

[50] THE COURT: Is there any reason why Volvo can't produce it if it's a Volvo document?

MR. WILLIAMS: Your Honor, these are e-mails, and these are like our e-mails, your e-mails, they clean them out, and I don't know that we can, Your Honor.

THE COURT: Unfortunately, I don't think mine ever get cleaned up. But I think part of the problem with this is this may have been before we perfected e-mail very much. This may have been back in the old days.

MR. WILLIAMS: This a different system for sure. It's essentially the same.

THE COURT: It's something kind of pre-e-mail, I think.

MR. WILLIAMS: Right.

THE COURT: Anything further? I'm going to overrule your objection, but note your exception and I'll be giving you continuing exception and objection to it.

MR. WILLIAMS: Thank you.

THE COURT: Tell me how much longer you're going to be with him you think or how much more have you got or can we finish with him today.

MR. BYARS: I don't believe so. We'll be just about finished with him by the end of the day.

THE COURT: Okay. I've got one juror that I need to maybe get to her place of employment a little early, but if we have to go till 5:00, we will certainly do it. Are you going to

* * *

[52] Q Mr. Heck, let me direct your attention to Plaintiff's Exhibit 100.

A Yes, sir.

Q What is that?

A This is a memo out of the Volvo memo system and it's the Gustavson letter dated March 1998.

MR. BYARS: Your Honor, I'm going to move for admission of Plaintiff's Exhibit No. 100.

THE COURT: Any objection?

MR. WILLIAMS: No objection.

THE COURT: It will be admitted without objection as Plaintiff's Exhibit No. 100.

Q Mr. Heck, was this submitted after that meeting in Marco Island, Florida?

A Yes.

Q All right. And let me just have you read the paragraph starting right here, if you can see that.

A Mark keynoted the meeting by stating that Volvo intends to achieve the best distribution network in the business. Speaking to customer demands for increased service among fierce competition, Mark indicated that 50 percent of Volvo Truck dealers would not be in business in the next few years.

Q All right. This was, this was stated in the Gustavson letter March 1998?

A Yes.

[53] Q All right. Bill, what did you do in response to this Volvo Vision?

A I decided that I would do everything I could to not be in the 50 percent that was eliminated and I would take whatever steps necessary to survive.

Q All right. And what steps did you take?

A I requested permission from Volvo to locate across the street, and I hired additional sales people.

Q And who did you correspond with in regard to your request to move across the street?

A Stan Boris.

Q And who is Mr. Boris?

A At the time Stan Boris was in charge of their dealer development operation on a national basis out of Greensboro.

Q And did Mr. Boris correspond with you in writing?

A Yes, sir.

Q Let me direct your attention to Plaintiff's Exhibit No. 46. Your Honor, I understand there's no objection. If I can just put it up?

MR. WILLIAMS: No objection, Your Honor.

THE COURT: It will be admitted without objection.

Q Is Exhibit 46 a copy of a letter you received from Mr. Boris?

A Yes, sir.

Q Would you just tell the jury what it says?

[54] A This is a copy that says, "Dear Bill, in response to your previous letter – or letter of March 10th and previous discussions with Mike Truta, we will approve your relocation of the sales and truck inventory to the body shop location across the street with the following caveats, and he lists out five requirements.

Q All right. And how does he conclude this letter here?

A He says, however, our conditional approval of this location in no way is considered a commitment on our part to maintain you as a dealer.

Q No commitment by Volvo to maintain you as a dealer, and for a waiver by Volvo of any deficiency or violation of the Dealer Sales and Service Agreement or the applicable Portfolio of Criteria, is that what that says?

A Correct.

Q At this time had you received some letters concerning the objectives that were assigned by Volvo?

A At this time we had been receiving them I'd say six to – for six to nine months, somewhere in that neighborhood.

Q All right. What did you think at this time that Volvo was doing with those objectives?

A I had decided that they were using the objectives to put Reeder-Simco out of the Class 8 business.

Q And how is that?

A Well, they would not allow us sufficient price reduction to [55] obtain our sales necessary to meet our objective.

Q Let's talk about your objectives. What – and I'm going to refer you to Plaintiff's Exhibit No. 5, which sets forth your objectives for 1995. Your Honor, I move for the admission of Exhibit 5.

MR. WILLIAMS: Just a moment, Your Honor. Your Honor, I think this falls within the heading of one of our – if I may approach the Bench . . .

THE COURT: Yes, you may.

(The following proceedings were had at the Bench between Court and Counsel and out of the hearing of the jury:)

MR. WILLIAMS: This is No. 5, Market Objectives of Volvo. That falls under the terms of our time bar claims because it's not –

THE COURT: Is there going to be some monetary, some damages in connection with that?

MR. BYARS: No. I mean we're using that as just to show what the objectives were and what Volvo did with those objectives for 1995.

MR. WILLIAMS: To the degree he's saying that they set the objectives and then took action in 95 to prevent them from meeting, and I think it's time barred.

THE COURT: Well, I'm going to admit it.

MR. BYARS: I don't think any kind of a letter was ssued concerning the 1995 objectives.

[56] THE COURT: I'm not sure I understand your objection to this then. You know, I know it's 1995, but I think the original franchise is also 95.

MR. WILLIAMS: That's true. The five-year agreement that runs from 95 to 2000, so I didn't object to that because it covers the applicable period.

THE COURT: Was this a one-year plan, the one you're looking at there?

MR. WILLIAMS: Yes. This is the –

MR. BYARS: This is what was issued with the agreement. I mean . . . we wanted to show what these started with.

MR. WILLIAMS: I'm sorry. I thought that Mr. Heck's testimony was that he didn't get those. They were going to put him out of business, so I was assuming he was going to have some claim based upon this that they couldn't make these objectives based upon Volvo's actions.

MR. BYARS: I don't think there was any kind of a letter issued by Volvo about this letter. We just want to show what the objectives were in 95.

THE COURT: When they started?

MR. BYARS: When we started with this.

THE COURT: I think that's permissible. If you still object, I'll overrule it. Is that No. 5?

MR. WILLIAMS: Yes, Your Honor, it is No. 5.

THE COURT: Thank you.

[57] (The following proceedings were had within the presence and hearing of the jury:)

THE COURT: Can you all see why my court reporter is so skinny? He runs back and forth to the end of the deal there. It will be admitted as Plaintiff's Exhibit No. 5. Continue, please, sir.

Q Mr. Heck, this says 1995 Marketing and Business Plan, Mr. David Reeder, Reeder-Simco White GMC, Southern White GMC, Volvo GM Heavy Truck. Was this issued after you signed the franchise agreement in 1995?

A Yes.

Q All right. And the second page here, what does this describe?

A Overall it shows briefly registrations in Class 8, how many trucks are registered, you know, for that year. It shows 1994, 698; 1993, 672. Projected market size competitive ranking, you know, things such as that.

Q What does that total registrations mean?

A Well, it's an annual.

Q Pardon?

A That's an annual registration of new trucks.

Q Class 8?

A Yes, annually.

Q All right. And then – I'm sorry. I need to see your page. This is entitled Sales Planning Potential and New Truck Retail [58] Sales Objective. Did you understand this to outline your objectives as set by Volvo for 1995?

A As far as it relates to truck sales and engines.

Q All right. Here it says the retail sales under new Class 8 is 94. Does that mean 94 units?

A Yes. That's our objective.

Q Okay. And these two columns here, VED 12 and VED 7, what are those?

A VED 12 is 12-litre Volvo brand engine, and VED 7 is a seven-litre Volvo brand engine.

Q All right. This down here under 1995 objectives says White GMC purchase objective $738,900. What is that?

A That's a requirement or an objective that we purchase $738,900 worth of parts from Volvo.

Q That's for the year 1995?

A Correct.

Q All right. Let's take a quick look at what your objectives were in 94 before this agreement, and let me direct your attention to Plaintiff's Exhibit No. 3. Your Honor, we move for the admission of Plaintiff's Exhibit 3.

THE COURT: Any objection?

MR. WILLIAMS: No, Your Honor.

THE COURT: Be admitted without objection as Plaintiff's 3.

Q If we look at this, Mr. Heck, for 1993, says 1994 Forecast [59] of Operations White GMC and Class 8 Volvo Trucks, and then there's the number 44, is that right?

A Yes.

Q So that meant in 1993 you had a sales objective on Class 8 of 44 units?

A In 1994 I believe you meant to say.

Q That's correct. I'm sorry. 1994.

A 44.

Q All right. And it went to 94 in 1995, right?

A Right. And the registrations held about the same. In fact, they went down a little.

Q Okay. Well, we are looking at the market as they describe it in 1994 where the average analyzed for 1993 was 689 registrations, is that correct?

A That was the total for 1993 on an annual basis.

Q All right. And in 1994, which is under your 1995 objectives, it was 698.

A Right.

Q Is it your understanding that from Volvo that they determined your objective based on the market or the registrations?

MR. WILLIAMS: Objection, Your Honor; calls for speculation.

THE COURT: I don't understand the question. If you understand it, you can – you want to rephrase the question?

[60] MR. BYARS: Sure.

Q What is your understanding of how Volvo determined the objective for 93 and 94?

A Well, they applied some percentage to what they expected the total registrations to be.

Q Okay. And your 1995 marketing business plan showed registrations of 698. And your 94 business plan showed registrations of 689. But the increase in your objectives was about – well, went from 44 to 94, didn't it?

A More than double.

Q What were your actual sales in 1994 for Class 8 heavy trucks? Refer you to Exhibit 268.

THE COURT: Exhibit what, sir?

MR. BYARS: 268.

THE COURT: Mr. Shannon, Mr. Williams, you may both move, if you'd like to.

MR. WILLIAMS: Thank you, Your Honor.

Q Your objective for 94 was 44 units. What were your actual sales for 94?

A 65.

Q Your objective for 1995 was 94 units, is that right?

A Yes.

Q What are your sales for 1995?

A 72.

Q All right. So you met your objective in 94 and then there [61] was an improvement in sales in 95, but you didn't make your objective, did you?

A Correct.

Q Next let me refer you to Plaintiff's Exhibit No. 7.

A That's what's entitled a 1996 Marketing and Business Plan.

THE COURT: Did you move to introduce 268?

MR. BYARS: We do – we now so move, Judge.

THE COURT: Any objection to 268?

MR. WILLIAMS: Not to this Exhibit, Your Honor – we'll –

THE COURT: It will be admitted as Exhibit 268. I'm sorry. Go ahead, sir.

BY MR. BYARS:

Q Take a look at Exhibit No. 7. That's your 1996 marketing plan?

A Yes, sir.

Q Is that correct?

A Yes, sir.

MR. BYARS: Your Honor, we move for the admission of Plaintiff's Exhibit No. 7.

THE COURT: Any objection?

MR. WILLIAMS: Just a moment, Your Honor. He kept moving around the numbers here.

THE COURT: I thought I was the only one that was confusing.

[62] MR. WILLIAMS: If I may have one moment, Your Honor, with Mr. Byars.

(Off the record at this time.)

THE COURT: Was there an objection?

MR. WILLIAMS: Your Honor, there were some notes on here that someone's made, and subject to that – they're apparently added after the fact, I'm not objecting to it, but those are obviously not part of all of those records, whatever scribbling that was put on it after the fact.

THE COURT: Okay. You either need to take off the scribbling or block it or have an explanation for it of some sort.

MR. BYARS: Let me just use what Volvo produced, Judge, and I'll refer Mr. Heck to Plaintiff's Exhibit No. 9.

THE COURT: Are you withdrawing No. 7 then?

MR. BYARS: Yes, Your Honor.

(Off the record at this time.)

THE COURT: Any objection to No. 9.

MR. WILLIAMS: Yes, sir. Same objection. It's got the same marks on it.

Q Mr. Heck, if you will look, take a look at Plaintiff's Exhibit No. 9, please?

A Yes, sir.

Q On page four?

A Yes.

[63] Q Is that your writing?

A Yes.

Q And on page five, is that your writing?

A Yes.

Q And did you make those notations at or near the time that this 1996 marketing and business plan was submitted to you by Volvo?

A Yes, sir.

MR. BYARS: We move for the admission of Plaintiff's Exhibit No. 9?

THE COURT: Still object?

MR. WILLIAMS: No, not with that clarification, Your Honor.

THE COURT: It will be admitted without objection as Plaintiff's No. 9.

Q Now, this says the 1996 Marketing and Business Plan, is that right?

A Yes, it does.

Q In the agreement, the franchise agreement you referred to a Portfolio of Criteria, I believe. Do you remember that?

A Yes.

Q Did you ever understand what a Portfolio of Criteria was?

A We thought we had an understanding, but it turned out I don't know. We asked and we never have understood.

Q All right. But you understand these 19, this 1996 Marketing [64] and Business Plan to be the objectives assigned by Volvo, is that right?

A Yes, I do.

Q And your objective for 1996 in new Class 8 sales was 89 units, is that correct?

THE COURT: I think you can make that a little larger, too, Mr. Byars?

A Yes, that is correct.

Q All right. And what were your actual sales in 1996?

A 66.

Q You see on the next page of that Exhibit says 1996 after market objectives? And under Class 8 vehicles in operation says 4,705 and that you circled that and said no?

A I circled that as well as the per truck potential and said no.

Q Why is that? What does that mean?

A It means that there are not 4,705 Class 8 vehicles in operation, and that they do not represent $3,800 apiece in part sales.

Q Okay. Do you recall the registrations that we looked at for 94 and 95? I think it was like 689 and 694. Is that what that is also talking about?

A Excuse me?

Q On these prior objectives that we just reviewed, is that the same – is that attempting to show the same type of information?

[65] A No. No. It's a change in method. It's from an annual registration now that's shifting to a total vehicles in operation of some type.

Q All right. And you disputed that number?

A Correct.

Q What was your parts purchase objective under this document?

A Purchase objective was 250,000.

Q That's shown here. We show the 1995 numbers and then the 96 objective of 250,000?

A Yes.

Q Is that right? This next section, page seven, this shows some gross profit figures?

A Yes.

Q And that's – these were issued by Volvo to Reeder-Simco, is that right?

A I believe that's correct; yes, sir.

Q And for Volvo Class 8 trucks they list the per unit gross profit for the new trucks of $2,500?

A Yes.

THE COURT: Again, Mr. Byars, you can make that larger.

MR. BYARS: Okay.

THE COURT: What you're looking at is a lot clearer to you than it is to me and the jury on this deal. You need to make it a little larger if you can.

MR. BYARS: Okay.

[66] THE COURT: Maybe if you'd take your glasses off you would be in the same shape the rest of us are. No. You're doing a good job. Didn't mean to be critical.

Q Did you meet the objective in 1996, your sales objective?

A No.

Q Did Volvo let you know if you didn't meet that objective?

A Yeah, I believe so.

Q Okay. Let me refer you to Plaintiff's Exhibit No. 16. What is Plaintiff's 16?

A It's a letter dated April 28th, 1997, to Mr. David Reeder from a Mr. Patterson, Executive Vice President.

THE COURT: Any objection?

MR. WILLIAMS: No, Your Honor; no objection.

THE COURT: Be admitted without objection as 16.

Q And this letter states, "Dear David; Each year Volvo GM Heavy Truck Corporation performs a review of its dealers. During the review we consider factors that we judge key to determining how successful our dealers are in maintaining their commitments to their contracts and agreements with Volvo GM Heavy Truck. For example, Dealer Sales and Service Agreement Annual Marketing and Business Plan, VED Addendum, VN Commitment and Agreement, et cetera."

THE COURT: Mr. Byars, don't read quite so fast –

MR. BYARS: All right.

THE COURT: – or my court reporter is going to get [67] after me.

Q Skipping down, it says "attached you will find a summary of our review of your 1996 performance. The results of this review necessitates our issuing a one-year Probationary Status Addendum to your Dealer Sales and

Service Agreement beginning March 31, 1997. In addition, a deficiency cure schedule has been included which defines acceptable levels of performance which must be met in order to receive a Standard Term Addendum for your Dealer Sales and Service Agreement. Failure to meet these levels of performance by March 31, 1998, may force us to seek remedies available to us under the terms and conditions of the Sales and Service Agreement." Is that what the letter says?

A That page, yes, sir.

Q And now attached to this letter was a Probationary Term Addendum, is that correct?

A Yes.

Q And it shows the effective date March 31, 1997, and the expiration date of March 31, 1998, is that correct?

A That's right.

THE COURT: Mr. Byars, is that all a part of Exhibit 16?

MR. BYARS: Yes, Your Honor.

THE COURT: Okay. Fine.

Q Now, let me ask you this: For 1995, although you did not meet your sales objective, did you receive any kind of a letter [68] like this putting you on any kind of a probation for not meeting your objective in 1995?

A No.

Q Was this the first kind of letter that you had ever received in your business, the heavy truck sales, where

you were given some type of Term Addendum and I guess a warning for failure to meet performance levels?

MR. WILLIAMS: Your Honor, he's gone beyond leading, now to testifying. This is a little bit much, I do think.

THE COURT: Yeah, try not to lead.

Q Is this the first time you received a letter like this?

A Yes, sir.

Q This was dated in April of 1997, is that right?

A The cover letter was the end of April 1997.

Q All right. Who was it that signed this Probationary Term Addendum?

A The Addendum itself, that's Stan Boris's signature, Director of Distribution and Dealer Development.

Q If you – for 1995, you were given a term of a contract to the year 2000 under the agreement, correct?

A Yes, March 31st, 2000.

Q What was your understanding of when the agreement would expire based on this letter?

A March 31st of 1998.

Q And what were your conclusions at the time you received this [69] letter?

A You know, we didn't understand. Probation we didn't think applied to this, but we were a little confused and we started to try to find out exactly what was this, what was it?

Q Now, let me have you take a look at Exhibit No. 17. What is that?

A That's a letter dated April 30, 1997. April 30th, 19 – to all dealer principals and it's from Stan Boris, Director of Distribution and Dealer Development.

MR. BYARS: All right. Your Honor, we would move for the admission of Plaintiff's Exhibit No. 17?

MR. WILLIAMS: No objection.

THE COURT: Be admitted without objection.

Q Now, what does this letter say?

A It says, reminds us that they issued the agreement in April of 1995 and then in the middle paragraph it says there have been requests from dealers for more clarity and definition concerning the rights and obligations of both parties to this agreement and as a result, we have decided to allow the current agreement to expire according to its terms on March 31st, 2000, and that they would work on a new agreement.

Q And this letter was just a couple days before you received your probationary term.

A Was it before or just after?

Q I believe it was just after, wasn't it?

[70] A I think it's after.

Q So what were your thoughts at that time?

A You know, we were trying to get somebody to tell us how long our franchise lasted and what's going on.

Q Did you ever receive a satisfactory explanation for this 1996 evaluation?

MR. WILLIAMS: Your Honor, I object. He's leading. I ask you to strike a satisfactory explanation.

THE COURT: Well, strike the term satisfactory explanation. Did you ever receive an explanation?

Q Did you ever receive an explanation for your 96 evaluation?

A No, sir.

Q I'm going to look back here at this Plaintiff's Exhibit No. 16. Third page of the Exhibit. What did they have down – what did Volvo have down for your actual sales for 1996?

A 25.

Q What did your records reflect?

A 66.

Q Did that cause you some concern that they only had you down for 25 sales?

A Yes.

Q And did you seek to have that corrected?

A Yes.

Q How was it that you recorded your sales for 1996?

A Our sales I recorded by our financial statement.

[71] Q All right. And those sales are recorded or they hit the books when you deliver trucks to your customer?

A Yes.

Q Okay.

A For most, most cases.

Q Who did you deal with in trying to get that 25 number corrected to the right amount?

A As I best remember, it was primarily Barbara Rosetti. I believe it was Barbara Rosetti from Greensboro.

Q Now, let me have you take a look at Exhibit No. 25.

A Yes.

Q What is Exhibit 25?

A That is another one of these electronic memos from the Volvo memo system.

MR. BYARS: All right. Your Honor, I move for the admission of Plaintiff's Exhibit 25?

THE COURT: Any objection?

MR. WILLIAMS: No objection.

THE COURT: Be admitted without objection as 25.

Q This letter states, Bill, you must think I have abandoned you. I just realized this morning that you had not picked up my memos telling you that I was still working on the issues and when I called last week you were unavailable. I'm sorry for the mixup. I've gone through the records in detail to determine the differences between your sales count and ours. First we consider [72] a truck retailed when it is warranty registered. In reviewing the

records I noted that some 34 trucks for Transamerica business were warranty registered between December 21 and December 29, 95. Says you may have held these sales on your books until 96, but we consider them 1995 sales. I did, however, find an additional 11 trucks warranty registered in 1996, which were erroneously counted in 1995. I have included them in your 1996 retail number which will bring that up to 36 or 40 percent of your objective, still below acceptable levels.

Q In looking at your current numbers, I see that you have already retailed some 66 trucks this year and have an additional 12 on the order board. This looks like you will have no problem in meeting the minimum criteria set out for you in truck sales. I've also rechecked the V E D number and found that you had indeed sold one V E D engine; however, one engine against a target of 20 is only 5 percent of your achievement objective, is that correct?

A Yes.

Q Did you agree with the per count of 34?

A No.

THE COURT: What's this date on that memo?

Q That's dated June 24th of 1997. Let me have you look at Plaintiff's Exhibit No. 19. Is this a letter that was directed to Reeder-Simco by Russ Tedder, Regional Vice President for Volvo, and Dwight McAlexander?

[73] A Yes, it's a letter to David Reeder dated May 27th, 1997.

Q And that's after the letter from Stan Boris talking about the fact that no dealer in 95 had received a Term

Addendum and that the expiration would be in 2000. So now you received this on May 27th?

THE COURT: Let's – before you put it up, let's see if there's an objection. Do you have an objection to 19?

MR. WILLIAMS: Your Honor, not to No. 19. Just to counsel's continued leading of the witness, I do object to that.

THE COURT: Well, I'm going to sustain the leading and I'm going to admit 19. Go ahead, sir.

Q On this letter you received from Mr. Tedder, what do they have down for your sales?

A They still have 25. This letter actually pre-dates or this letter comes after the message from Barbara Rosetti which was exhibit 25 that's dated May 23rd.

Q All right. The print date on that was what I referred to earlier, but the memo from Miss Rosetti actually came out when?

A May 23rd, 1997.

Q All right. So this came after her correction to 34?

A Yes.

Q And it says in the past we normally scheduled meetings between you and the field managers to review your performance. This year, however, we do not want to detract from the time the field people are spending trying to transact business. What did [74] that indicate to you?

A Just what it says, that the field people don't have time to go over this with us.

Q Well, were you looking for an explanation, though, for your 1996 evaluation?

A Yes. We keep getting these different versions, you know, in a short span of time.

Q Now, take a look at Exhibit No. 32.

A Yes, sir.

Q Is that a letter you received from Barbara Rosetti in August of 97?

A Yes. It's dated August 12th, 1997, to me.

MR. BYARS: Your Honor, we move for the admission of Plaintiff's Exhibit No. 32.

THE COURT: Objection?

MR. WILLIAMS: No objection, Your Honor.

THE COURT: Be admitted without objection.

Q So in August, Miss Rosetti has redone your dealer evaluation for 96 and she has increased the sales to 36 out of 89, is that right?

A That's right.

Q Did you receive yet an additional piece of correspondence concerning your 96 objectives?

A Well, yes, because I refused to sign that because it was in error.

[75] Q Okay. And let me direct your attention to Exhibit 36. Who is that from?

A That's a – that would have been faxed to me. It's from Mike Truta to Bill Heck, a fax dated I believe September 2nd, 1997.

Q All right. We move for the admission of Plaintiff's Exhibit 36.

MR. WILLIAMS: No objection, Your Honor.

THE COURT: Be admitted.

Q It says, Bill, as of today we have not received your 1996 dealer evaluation. Effective today until we receive the 1996 dealer evaluation, I will no longer be able to supply you with new truck C E. What is C E?

A Well, that's another word for concession.

Q All right. I will not be able to supply you with new truck C E, customer and dealer visits. So he says if you don't get this 96 evaluation form back, I'm not going to visit you.

A That was not my interpretation. My interpretation was that I could not bring customers or visit the factory for the purpose of selling trucks.

Q And then he says I urge you to please return the 1996 dealer evaluation. If there's something you disagree with, please note and return to us. Was the – did you receive yet another piece of correspondence concerning the 96 evaluation?

A Yes, sir.

[76] Q Let me direct your attention to Plaintiff's Exhibit No, 37. What is that?

A It's a letter from Russ Tedder to David Reeder dated September 4th, 1997.

MR. BYARS: Okay. Your Honor, we move for the admission of Plaintiff's 37?

MR. WILLIAMS: No objection, Your Honor.

THE COURT: Be admitted.

Q Says Dear Dave, attached is a copy of your 96 dealer evaluation. Although this was sent to you in May of this year, we have not received your signed copy returned. Please return this via fax to my attention as soon as possible. In the meantime we have no choice but to hold your concession requests. What were you doing at this time, Bill?

A I was working on a proposal for ABF Freight Systems.

Q All right. And attached to this letter of September 4 what was the sales that they had down for you?

A Still 25.

Q Did that cause you a little concern?

MR. WILLIAMS: Object to the leading, Your Honor.

MR. BYARS: What were your thoughts about that?

THE COURT: Sustained and then okay. How's that?

A By this time I didn't understand. One person says they have adjusted it to 26. I get a 25. I think it's 66, so nothing has changed.

[77] Q Did you have a discussion with Mr. Reeder about that?

A Yes, I did.

Q He faxed that on back reflecting that the sales were 66 that year?

A Yes. David and I had had a long discussion and we agreed that we needed to get this ABF bid out so we could possibly sell some trucks and we corrected it to what he believed the correct numbers to be and shipped it in as they had requested.

Q Okay. Now, if we look at this – if you utilize the true figures for 1996 of 66, where did you stand with regard to the other dealers in the nation?

A Well, you take 66 and divide it by 89. That's 74 percent. So we would be at a higher percent of objective than what the entire nation achieved and slightly below what the regional average was. We were between national and regional.

Q And so the national dealer average for meeting the objective was 70.7 shown here on Exhibit No. 37, right?

A That's correct.

Q So if you use your true sales of 66, you were – you had a higher percentage of meeting your objective than the remaining dealers?

A Yes.

Q What objectives were set by Volvo for you for 1997? I'll refer you to Exhibit No. 21. We move for the admission of Exhibit 21.

[78] THE COURT: Objection?

MR. WILLIAMS: Just one moment, Your Honor. (Pause) No objection.

THE COURT: Be admitted without objection.

Q A little bit different format. It says 1997 marketing and business plan.

Q And there are listed here near the bottom it says minimum 1997 Volvo Class 8 retail objective, is that right? Right here?

A Yes, it says 130.

Q And what was your parts purchase objective for 1997?

A It was, purchase objective was $625,765 based on vehicles in operation of 8,511.

Q That meant you had to purchase $625,000 worth of parts?

A Yes.

Q What had it been in prior years?

A I don't remember exactly. It was 250 or so.

Q All right. What did you – did you contest these objectives as set for you by Volvo?

A Yes.

Q How did you do that?

A As I recall, this one was presented to us by our district manager at the time who was Scott Manchester and I told him, you know, that the way things were, I couldn't achieve it. And I asked him what the vehicles in operation was based on and I believe he referred me to Miss Rosetti, but that's just my best [79] recollection.

Q All right. And did you actually look at the registrations, truck registrations in the area?

A Well, there was a process with Miss Rosetti where I think I called her and I said, well, show me the 8500. You know, maybe we're missing something, and then a series of correspondence ensued.

Q After your discussion, did Volvo reduce the sales objective from 130?

A Yes.

Q As to what?

A 110 as memory serves we.

Q All right. Let me refer you to Exhibit No. 39.

THE COURT: Holly, was the last one 21?

MS. PORTER: Yes, sir.

A Yes.

MR. BYARS: Your Honor, we move for the admission of exhibit 39.

MR. WILLIAMS: No objection.

THE COURT: Be admitted without objection.

Q Does this show your 97 objective is 110?

A Yes, it does on the second page.

Q So originally from 89 to 130, now from 89 to 110.

A Yes. Right.

Q And what were your actual sales in 1997?

[80] A 85.

Q Okay. With regard to the parts purchase objective, are you familiar with state law concerning the relationship between the dealer and manufacturer on objectives or purchase requirements?

A Yes. Every year you have to apply for an Arkansas motor vehicle license and when the license comes back to you annually, they send you a copy of the pertinent statutes and I would read those.

Q Okay. Did you have any problems with the parts purchase objective as it was provided to you in 1997?

A Yeah, in two, in two ways. It should be a parts sales objective and it should be reasonable.

Q All right. Okay. And you raised those issues with people at Volvo?

A Yes.

Q And this was the result of getting your sales objective decreased from 130 to 110?

A Yes. The 110 and I believe the parts purchase objective was lowered as well to 395,000.

THE COURT: From 625?

A From 625, I believe.

Q Now, did you receive some type of a letter from Volvo concerning your 1997 objectives? Let me refer you to Plaintiff's exhibit 44.

A Yes.

[81] MR. BYARS: Your Honor, we move for the admission of 44.

THE COURT: Any objection?

MR. WILLIAMS: No objection.

THE COURT: I made a note to the clerk. It's about – in connection with Exhibit 44, it's about 44-degrees in here. Do you think we –

MS. PORTER: Go ask?

THE COURT: – turn it off or turn it up or something? Is anyone else getting cold? It will be admitted without objection.

Q What is the date of this letter, Mr. Heck?

A It's dated March 13th, 1998, to Mr. David Reeder from Barbara Rosetti.

Q Okay. When was this in relation to the Marco Island meeting?

A Well, the letter was written approximately a week after.

Q It says enclosed you will find your 1997 probationary cure status as of December 31, 97.

A Yes.

Q As you will note, you were unable to meet the required achievement in relation to VED engines and parts purchases as outlined with the 1997 Deficiency Cure Schedule included in Chris Patterson's letter of April 28th. Due to these results we will maintain your probationary status during 1998. Enclosed you will [82] find two copies of the 1998 Deficiency Cure Schedule for the year outlining the achievement required by your dealership by December 31, 1998, to be removed from probation. And if you take a look at the next page – well, first of all, this letter doesn't mention anything about vehicle sales, does it? It's talking about the Volvo engine and parts purchase?

A It strictly talks about purchases. It talks about parts purchases and VED's.

Q What's wrong with that about having a parts purchase objective?

A It doesn't appear to comply with the –

MR. WILLIAMS: Your Honor, just a moment. May we approach the bench?

THE COURT: Yes, you may.

(The following proceedings were had at the Bench between Court and Counsel and out of the hearing of the jury:)

THE COURT: What's the –

MR. WILLIAMS: The objection is, Your Honor, I think he's eliciting a legal opinion. I think Mr. Heck is getting ready to testify in his opinion –

THE COURT: It violates –

MR. WILLIAMS: Yes; that's correct.

THE COURT: I was a little concerned about that when he got into it, but I think you can ask him what his concerns are, but I don't think he can state that in his opinion it violates a [83] certain Arkansas statute or something.

MR. WILLIAMS: Thank you, Your Honor.

(The following proceedings were had within the presence and hearing of the jury:)

THE COURT: Continue, Mr. Byars.

BY MR. BYARS:

Q If you look at this Probationary Cure Status, let me ask you, first of all, did anyone from Volvo ever explain to you what a Probationary Cure Status was?

A No.

Q Did you request an explanation?

A Yes. I was confused over the letter that said everybody goes through March 2000, because there's a lot of questions on how the franchise is, and we still get all of these letters.

Q With regard to the second page of this Exhibit, your 1997 objective shows 110. The required achievement by December 31 was listed as 77 and your actual sales were 85, is that right?

A Yes, and that matches our number as well.

Q And so you were, you were 110 percent of the required achievement, but you were on probation, placed on probation? Is that your understanding?

A That's what the cover letter said.

Q Right.

THE COURT: And what's the exhibit number of that, Mr. Byars?

[84] MR. BYARS: That was 44.

Q What were your heavy truck sales objectives for 1997, I'm sorry, 1998? Take a look at Exhibit 50.

MR. BYARS: Your Honor, I'll move for the admission of Plaintiff's Exhibit 50.

MR. WILLIAMS: Your Honor, we don't object to the document itself. Again, there are some scribblings on here that are not part of the document.

THE COURT: I'm going to admit it subject to explaining what the scribblings are.

Q Mr. Heck, if you would look at the fourth page of that Exhibit, I think it says at the bottom 202,124. Is that your notation?

A Yes, sir.

Q And you have circled net working capital requirement?

A Correct.

Q Is that a capital requirement Volvo requires Reeder-Simco to have?

A Yes, sir.

Q And you've drawn a circle around that. What was the purpose of your notation?

A Well, they're saying that the standard net working capital required is $800,000 and that ours actually is 531,032, so it would be another deficiency and I questioned that number.

Q Okay. You believe that you actually met the standard of the [85] $800,000 working capital?

A I believe our working capital was, depending upon the day, it's another Exhibit, so I can't bring it up now.

Q Well, let me refer you to Plaintiff's Exhibit No. 50-A. What is that Exhibit?

A That is a 1999 marketing and business plan, Volvo Trucks North America.

Q Okay. Is that the notations that describe what your working capital was?

A Yes.

MR. BYARS: Your Honor, we would move for the admission of Plaintiff's Exhibit No. 50-A?

THE COURT: Any objection?

MR. WILLIAMS: Just one moment, Your Honor, if I'm following counsel. (Pause) Yes, Your Honor, we object. This document, 50-A, seems to just contain Mr. Heck's own notes as to how much he thinks he's got. This is not a Volvo document. I mean it is a Volvo document, but, again, with his writing it appears.

MR. BYARS: Your Honor, I believe it would be a matter for examination.

THE COURT: Yeah. I'm going to admit it. You can cross examine and probably hear some testimony from Mr. Heck about it, so your objection is overruled.

Q Based on your notes, Mr. Heck, what was your – what was the [86] dealership working capital?

A Depending upon what dates you look at, we use a LIFO Inventory Adjustment and our actual working capital depending upon the date, is anywhere from $1,196,000 to $1,520,000.

MR. BYARS: All right. Back to your Exhibit 50, Your Honor, we move for the admission of Exhibit 50 with that explained.

THE COURT: It will be admitted.

Q Your retail sales objectives for heavy trucks in 1998 as assigned by Volvo was 78, is that correct?

A Yes. That's on this exhibit.

Q All right. What were your actual 1998 sales?

A 34.

Q 34?

A 34.

Q Take a look at Exhibit 50-A. Does that have your 1999 objectives as assigned by Volvo?

A Yes.

Q And there's a – we've got a cutout there for the hole, but where it says 1999 Volvo VN Retail Sales Objective, 60, and them 1999 Volvo VOC Truck Retail Sales Objective, 25.

A That's correct.

Q Would you explain that?

A Yes. The VN is a highway tractor and the VOC would be an abbreviation for a vocational truck. So our new truck sales [87] objective is 85.

Q All right. 85 in 1999?

A Right.

Q What were your actual sales in 1999?

A 18. 18.

Q 18. Mr. Heck, let me ask you this: After you signed the Franchise Agreement with Volvo in 1995, did you continue to provide bids to the same customers with whom you had previously sold?

A At a minimum.

Q All right. And what else did you do in your efforts to increase sales?

A In 1998 we had opened up the new facility for the benefit of Volvo and we had hired additional sales people with more focus on Volvo as opposed to any other brands that we carried. And we went out and contacted maybe some more customers that we had not been as powerful after before. We really put out an all-out effort to go out.

Q All right. How many trucks did you make concession quotes on in 1995?

A There was about 900. There's a chart for that.

Q Let me refer you to Exhibit 331. What is Exhibit 331?

A 331 is a summary of how many units were quoted based on fleet concession requests we were able to recover historically, you know, from the past.

* * *

[91] admit then 292, subject to the Court's prior rulings.

MR. BYARS: All right Thank you, Judge.

Q Bill, let me now show you what's been admitted as Plaintiff's Exhibit No. 331. Tell me what this is.

A That is the number of vehicles quoted by year, 1995 through 1999. It's totalled and then the average.

Q So these were trucks upon which you were on the business in those years?

A Yes, sir.

Q The numbers?

A Yes.

Q So for 95 we had 945?

A Correct.

Q 96 is 735?

A Right. Now, that's quotes. That's not sales. That's quotes. So –

Q Understand. We'll put quotes here.

A Yeah.

Q And then in 97, 947?

A Correct.

Q In 1998, 1452?

A Right.

Q 1999, 1327.

A Right.

Q And that's – this Exhibit 331, it also shows the average [92] number of quotes of trucks submitted by Reeder-Simco, is that correct?

A That's right.

THE COURT: Are those quotes to customers, potential customers?

A Those are the number of vehicles involved in the quotes, and they are potential customer sales. You're correct.

THE COURT: Go ahead, sir.

Q All right. You believe that your sales results were consistent with the number of trucks you were bidding on?

A Not at all; no, sir.

Q And what did – what do you believe to be the problem?

A I didn't have the availability of the same pricing levels that the other dealers had available to them.

Q All right. Let me show you what's been marked as Plaintiff's Exhibit No. 69. What is that document?

A Number 69 is a Volvo policy letter to advise the dealers of a policy of Volvo.

MR. BYARS: We move for the admission of Plaintiff's Exhibit 69, Your Honor?

THE COURT: Objection?

MR. WILLIAMS: No objection.

THE COURT: Be admitted without objection.

Q This policy here, it says it's the sales policy letter No. 1 from Volvo Trucks North America Dealer Network in October of 98. [93] And it says under the policy, the one we are concerned with, this is Volvo's policy, RSA. Now, what is the RSA?

A That's another name for concession. RSA stands for the words Retail Sales Assistance, okay, concession, CE.

Q RSA is provided as required to meet competitive situations. VTNA will provide RSA uniformly, as in the case of a specific customer transaction, irrespective of customer domicile, and in the same manner to all dealers, is that correct?

A Yes, sir.

Q So that's Volvo's policy statement. Do you have any problems with the policy statement as it is stated?

A Not at all.

Q What do you have a problem with with respect to the policy?

A It was not executed. We did not receive what that was described as.

Q What is your understanding of the general process Volvo uses in granting concessions?

A We've already gone over the fact that the dealer puts the deal together and sends in the requests, so it starts from the dealer to Volvo and then Volvo transmits it somehow to their District Sales Managers. And then I know now that they use a process involving something called a matrix where they have a Guideline that has approximately 567 model groupings down one side of the table and then a line grouping across the top like zero to three, you know, so on and so forth. And it allegedly [94] gives the field a limit on what they can approve without having further executive rulings.

Q Let me show an example of a matrix. Your Honor, I'm going to refer the witness to Plaintiff's Exhibit No. 97 and ask that that be admitted.

THE COURT: Any objection?

MR. WILLIAMS: Excuse me just a moment, Your Honor.

MR. BYARS: 97.

THE COURT: 97.

MR. WILLIAMS: 97. Can we approach the bench on this one, Your Honor?

THE COURT: Yes, you may.

(The following proceedings were had at the Bench between Court and counsel and out of the hearing of the jury:)

MR. WILLIAMS: Your Honor, we don't have any objection to the document as such, but you see it's marked confidential and under the terms of our Protective Order, I think its supposed to be, if submitted in court, then put under seal and we just want the appropriate protection for that.

THE COURT: We will do that. You need to – Miss Porter needs to be involved in that and we'll try to handle it different from any other.

MR. WILLIAMS: Okay. Thank you Your Honor.

MR. BYARS: Thank you.

(The following proceedings were had within the presence and [95] hearing of the jury:)

THE COURT: We had an incident last year where on a Friday afternoon we had a – had the fire alarm go off about 3:30 and everyone had gone home, and apparently they control the fire alarm from Little Rock, so it finally went off. I think it burned out. Exhibit 97 will be admitted.

MR. BYARS: Thank you, Your Honor.

Q Mr. Heck, give the jury an explanation of your understanding of this document.

MR. WILLIAMS: Your Honor, I'm sorry. I don't object to its admissibility, but I don't know that this witness has a foundation to testify concerning the document.

THE COURT: Well, he's – I'm going to say he does. I think he can give his opinion and express an opinion of the Plaintiff in this matter. It directly impacts him and I believe that he's qualified.

MR. WILLIAMS: I understand, but he said he did not get it until discovery, as I understood it.

BY MR. BYARS:

Q What is your understanding of what this is, Mr. Heck?

A This is what is termed a matrix and those listed down the left side, for example, on the third line, it says VNL 420 and VNL 610, those are the VN, over-the-road models with the different, you know, little sleeper, middle-sized sleeper, reading across, it gives a 17 percent, 19 percent, 21 percent, [96] 23 percent depending upon the quantity range up above where it will say like stock one-two, you can read those numbers, and then the numbers change very slightly by the models. You can see that. You know, in the one and two not so much, but then over at 26, there's a range of 17 percent on a W A up at the top to 23 percent on those auto cars and W G, so that is what was explained to us and what I understand to be a matrix. There was some foundation or beginning of how the District Sales Managers were advised by the Regional Vice Presidents of what their limit of authority was.

Q And what is your understanding of how this matrix process worked in practice?

A In practice, a District Sales Manager was able to use his judgment as to whether to give a dealer anywhere from 0 percent to 17 percent as in the case of the top row

column or like the VNL 420, 610 on a 20-truck deal, they could give up to 21 percent. See how it goes across and then from 10 to 25, but the District Manager, again, he could go anywhere from zero to 21 based upon his opinion of the situation, and, in fact, he could also at his decision level, he could ask that that number be approved at a higher level than 21. That was at his discretion.

Q Was that process fair in your mind?

A No.

Q Why not?

A Well, we end up with different dealers getting different [97] levels of concession based on either their District Manager having more knowledge or less knowledge of the deal they're on or another District Manager in adjacent or further away in part of the country could be bidding on similar transactions as to what you are and the one district manager might just have a different opinion of what he's able to give out to get that deal. He might have a bigger appetite to sell that order than another one, you know, that's, that's – understand that's my complaint.

Q When you first began working with Reeder-Simco, who was the manufacturer you worked with in the retail sale of heavy trucks?

A GMC Trucks and Coach Division.

Q How did the Volvo concession process differ from the GM methodology of granting the discounts?

A The difference is the district – the equivalent to the District Sales Manager at GM does not have an impact on these numbers. The numbers are approved from a

centralized location without regard to what dealer's requesting the deal.

Q Bill, who was your District Sales Manager or DSM during the timeframe here from 1997 into 2000?

A Mike TrutA

Q All right. Tell me what was your expectation as to what you felt your District Sales Manager ought to do?

A I thought several things. He should be aware of our objectives. He should be counseling us on how to obtain those objectives. He should be driven to obtain those objectives just [98] as much as I. He should work with our salesmen as required. He should help train the new people as his time allows. He should keep us abreast of these policy letters that have come up and make sure we understand them and apply them accurately, and various sales programs. He would be our source of sales support, you know, as it would develop.

Q How often did Mike Truta visit Reeder-Simco?

A Three or four times a year.

Q Did you have access to Mr. Truta's itinerary?

A Mr. Truta was sending his itinerary out weekly on the Volvo memo system to reduce the phone calls that go to the wrong place. In other words, once you knew where he was, you could call the dealership where he was located.

Q All right.

A So, yes, I was aware.

Q Did he – did he post his itinerary? Have you looked at where he posts his itinerary?

A Well, he sends it to us on the memo system.

Q All right. And where did Mr. Truta spend most of his time?

A Just my impression, most of his time was spent in Kansas City, Missouri.

Q And what's there?

A Westfall GMC Volvo.

THE COURT: Where was his office? Where was he based out of in the time he was your District Manager?

[99] A He lived in somewhere in the Kansas City area. Yes, sir.

Q Who was your Regional Vice President over your region from 1997 through 1999?

A Mr. Dez Fuller.

Q Did you attend the regular Volvo Regional Dealer Meetings?

A Yes.

Q Did you attend a regional dealer meeting in November of 1999?

A Yes, I did.

Q Was Dez Fuller at that meeting?

A Yes, he was.

Q Did you ask some questions during that meeting?

A Yes.

Q What did you ask – well, first of all, tell me who was in attendance at the meeting?

A Well, there were dealers from the Southwest Region. There was, as I recall, Joe Chastain, who was the head of Volvo Dealer Council at the time and from Volvo there was Dez Fuller. He was there being the Regional Vice President, and Chris Patterson was there, Executive Vice President, and Bob Wright. He's in charge of sales reports to Chris Patterson. Off the top of my head, I don't remember his title. But he's the top sales guy that reports to Chris Patterson.

Q All right. And who did you ask your question of at that meeting?

[100] A Well, the questions were being taken by Mr. Patterson and I asked Mr. Patterson if Volvo was going to continue their practice of micro-managing every deal that we were on to where we had to continue to request concession through this cumbersome process even for one truck. To sell one truck we have to go through this process and I didn't understand why we had to do that.

Q All right. And what response was made to your question?

A Mr. Wright fielded the question and he told me that Volvo would continue this process because it was necessary to protect their gross profit.

Q All right. Did Dez Fuller say anything in response to that question?

A Yeah. He stood up and he said, yeah, looking at me he says, yeah, I guess I am more stingy than others.

Q What did you understand that to mean in the context of the meeting?

A In line with what I already asked, that part of, part of the concession result was that for some reason Mr. Fuller was indicating to me that he gave out less concession to me than other either dealers in the region or other dealers in the country from other regional vice presidents.

Q Can you give me an example, and I'm asking about a comparison here of where this process has affected the business of Reeder-Simco?

A Sure.

[101] Q Let's take one, if we have time, Your Honor. Let me refer you to Exhibit 198. Are you there?

A Yes.

Q What is Exhibit No. 198?

A 198 is a special price confirmation, again, the form that we fill out to receive concession over and beyond the normal dealer price for a potential transaction.

Q And who was the potential customer on this deal?

A This was for Hiland Dairy Company.

Q All right.

MR. BYARS: Your Honor, I'll move for the admission of Plaintiff's Exhibit No. 198.

THE COURT: Any objection?

MR. WILLIAMS: Nothing, Your Honor, no additional objection other than those previously stated.

THE COURT: It will be admitted.

Q You said that your customer was Hiland Dairy Company?

A That's right.

Q Could you explain who Hiland Dairy is and how you came in contact with this customer?

A Well, Hiland Dairy is in the dairy business. If you go to Wal-mart Stores and buy some chip dip or milk or dairy products, it's most likely Hiland Dairy, so they are in the dairy business and they operate these trucks as what we call a private carrier. They don't hire out to other people. They just pull their own [102] loads around. And Hiland Dairy, their home office is in Springfield, Missouri, but they are domiciled in Ft. Smith as well. They have a location here, and we provide repair parts and body shop services to that location, and that's how we developed the business relationship with Hiland Dairy.

Q Did Hiland Dairy request you to make a bid for the sale of some trucks?

A Yes, sir.

Q And when was that?

A It was immediately prior to this July 21st pricing confirmation.

Q And how many trucks were they interested in purchasing?

A Twelve.

Q Okay. What was the model that you were bidding, what model truck?

A The model number was a VNL 64 T which is a VN day cab.

Q And what was the amount of concession that you requested for this potential sale?

A 12 percent is what I asked for.

Q All right. And what concession amount were you authorized to receive?

A 7.5 percent.

Q And who authorized that amount on the concession?

A Mike Truta.

Q And did you make a bid to Hiland Dairy based on that [103] concession approval?

A Yes, I did.

Q And what was the response?

A At first the customer was very receptive.

MR. WILLIAMS: Your Honor? To the degree Mr. Heck is now trying to characterize what the customer's response would be, that is clearly hearsay.

THE COURT: Yeah, I'm going to sustain that.

MR. WILLIAMS: Move to strike the last answer.

THE COURT: I will sustain the objection.

Q Take a look at Exhibit No. 199 and 199-A Let's first address Exhibit 199. What – just tell me briefly what is Exhibit 199?

A 199 is a vehicle invoice for a tractor sold to Hiland Dairy by Southwest Missouri Truck Center.

Q And that's another Volvo dealer?

A Yes, sir.

Q And where are they located?

A Springfield, Missouri.

Q All right. Your Honor, we would move for the admission of Plaintiff's Exhibit No. 199.

THE COURT: Any objection?

MR. WILLIAMS: No, Your Honor; no objection.

THE COURT: It may be admitted without objection.

Q So this is a what? This is the information that's contained [104] on the invoice to this dealer, is that right?

A It should – yes, it is. It is.

Q All right. Now, there's some information here it says sold to Southwest Missouri Truck Center, Hiland Dairy, Inc., and then we have what's called a postmark date of August 21, 1999, is that right?

A That's correct.

Q And what again does the postmark date represent?

A That's when the Order was received by Volvo for scheduling.

Q Okay. And if you compare the date that this dealer ordered these trucks, how close – how much time passed between your request for concession and the order by this other dealer?

A Approximately 30 days.

Q And this invoice indicates that that's for model 2000 VNL 64 T day cab, is that correct?

A That is correct.

Q And is that the same year model that you had requested a concession on?

A Yes. They're both 2000 model vehicles.

Q And, if you look on the invoice to the Missouri dealer, the price indicated for that chassis is 57,597, is that correct?

A That's dealer net, that's correct, for the base model.

Q And the amount on your comparison was 57,596?

A That's correct.

Q So we're a dollar off there, is that correct?

[105] A Yeah.

Q Now, the options which you had on your concession request was $9,283.

A That's right.

Q And on the Missouri dealer the options are listed at 9,282.

A Right. That's that missing dollar.

Q Now, the concession amount received by this dealer is shown Ion these lines, is that correct?

A That's right.

Q So this dealer got an 8.5 percent concession.

A That's right.

Q And does this invoice indicate that this dealer actually made sales to Hiland Dairy?

A It would indicate that he ordered them for them.

Q All right. And what does that tell you?

A He made the sale.

Q Now, take a look at Exhibit No. 199-A, and we move for the admission of that.

MR. WILLIAMS: I'm sorry. What was the number?

THE COURT: 199-A

MR. WILLIAMS: 199-A?

THE COURT: Don't show it quite yet, Mr. Byars. He's not expressed an opinion yet.

MR. WILLIAMS: No objection.

THE COURT: Now you may show it. Be admitted without [106] objection.

BY MR. BYARS:

Q Mr. Heck, does this document reflect the number of units ordered by the Missouri dealer on its sale to Hiland Dairy?

A Yes, it does. It reflects 12, 12 units.

Q In this case did Reeder-Simco miss a sale?

A Yes.

Q Did Volvo miss sale?

A No.

Q I'm going to have to go back and have you look. We need to get your 2000 objectives up there. Let me have you take a look at – I'm sorry, Your Honor.

THE COURT: That's okay. I think when you think we are at a stopping point, Mr. Byars, we may quit for the evening.

MR. BYARS: That's fine, if you desire, Judge. I just lost my place on the Exhibit that I was going to show.

THE COURT: Maybe I'll give you about 12 hours to find it then. Ladies and gentlemen of the jury, we are going to break for the evening. It's straight up 5:00 o'clock. When you get home, your spouse or significant other is going to want to know what that case is all aabout and tell me all you know and you simply must not discuss it. Tell them that later in the week that after they take you to dinner or fix dinner or whatever, you will tell them more than they ever want to know about this case, but it's absolutely imperative that you not discuss it with [107] anyone or allow anyone to discuss it with you. We are

going to remain in session until you're out. You can also leave your juror buttons here and you can also leave your juror notes in the jury room. The jury room will be open about 8:00 o'clock and we will have coffee and juice and hopefully some doughnuts that are less fat than what we had this morning, but that may not happen. Anyone have a problem being here at 9:00? Why don't we do that, and, Miss Porter, would you like for us to all go with you to the – well, and we wish you – we are sorry we kept you so late, but we hope the payroll works out, so let's remain in session until the jury is out of the room. Thank you very much. Have a good evening and I'll see you at 9:00 o'clock in the morning.

(Jury leaves the courtroom. The following proceedings were had outside of the presence and hearing of the jury:)

THE COURT: Let's let the record reflect it's now 5:02 and the jury is out of the room. Is there anything anybody wants to put on the record with the jury out of the room?

MR. WILLIAMS: Your Honor, I just might want to comment on the record on some of the things like we have just gotten into, they really are subject to the Court's ruling in limine this morning, and I don't want to –

THE COURT: I understand.

MR. WILLIAMS: – overly burden the record by coming to the bench every time we do have a – if we might have the record reflect, just agree to doing what we call the non-sales [108] continuing objection.

THE COURT: Well, I'll give you a continuing objection, but if you think that you need at any point to

make an objection in addition to the Motion in Limine and whatever, you certainly can.

MR. WILLIAMS: Thank you, Your Honor.

THE COURT: I think you can leave everything where it is. If there's something that is highly confidential or something, you may want to cover it up, but our cleaning crew does a magnificent job, but they do not mind avoiding us when we request it. So I think we can probably tell them that they probably need to stay out of the room. Anything else anyone can think of, Mr. Byars?

MR. BYARS: No, Your Honor.

THE COURT: We'll be in recess then till 9:00 o'clock in the morning. I'll be here from about 8:00 o'clock on, if you all think there's anything we need to put on the record, if you'll get the other side and locate the court reporter, we'll put it on. Thank you very much and have a good evening. (Off the record at this time.)

PROCEEDINGS OF JANUARY 15, 2002

THE COURT: Morning. Have a good evening? Miss Porter, did we get the checks out? Good. Good. I'll bet you're [109] the heroine of that whole group, are you not? We'll have the same rule as yesterday. We'll probably take a break at mid-morning, but if you need to take one before then, just give me a signal or a sign of some sort. Mr. Heck, you want to resume your place on the witness stand, please, sir. I'd remind you also that you're still under oath, sir.

A Yes, sir.

MR. BYARS: May I proceed, Your Honor?

THE COURT: Yes, sir, please, do.

BY MR. BYARS:

Q Mr. Heck, I'm going to show you what was previously admitted as Plaintiff's Exhibit No. 199. What is this document?

A That's an invoice to the Springfield, Missouri, dealer for trucks sold to Hiland Dairy.

Q All right. We talked about this yesterday. And I wanted to ask you, I meant to ask you what was the final net price charged by Volvo to Southwest Missouri Truck Center as a result of the 8.5 percent concession?

A Is this 318 we are looking at, Joe?

Q No. This is 199. I've got that up on the screen here.

A Oh, I was looking for it.

Q The second page of the invoice. What is that right there?

A Line 44 on that document is the amount of money that the dealer would actually pay for the truck at the time of the invoice.

[110] Q So that takes into account the concession of 8.5 percent?

A It includes that discount as well as freight.

Q All right. And what would be the final net price offered by Volvo to Reeder-Simco for the same vehicles with the 7.5 percent concession?

A It would be our dealer net multiplied by the 7.5.

Q So what is that number?

A Well, I need to find our dealer net, Joe. (Pause) Joe, I need to see how much the freight was at the time, please. It would be up higher on that piece of paper.

Q It's on 199?

A Yes. Or it's on my worksheet. We have them both.

Q Let me show you what's been marked as Plaintiff's Exhibit 198-B. Can you identify that document?

A Yes, sir. This is a worksheet prepared for the quotation to Hiland Dairy.

Q All right. Let me see that, please. Your Honor, we move for the admission of Exhibit 198-B.

THE COURT: Any objection?

MR. WILLIAMS: No, Your Honor.

THE COURT: Be admitted without objection.

A Do you want me to describe what I'm doing as I do it? Do you want me to do it as an example or just have me give you the result?

Q I just need for you to give me what your final net price [111], would be.

A All right.

THE COURT: Is it not on the Exhibit?

MR. BYARS: I believe he's – Bill, why don't you explain how you've come to that calculation?

A Just put this exhibit up there, Joe. You take the dealer net price and you reduce it by the amount of the concession and then you add the freight back in and you add the floor plan expense that you anticipated and you come up with the cost.

Q All right.

A All right.

Q And what is that number?

A The comparable number is $63,632.69.

Q I'm sorry. Would you repeat that?

A $63,632.69.

Q All right. So that's the difference in price that's compared to the 62,890 charged to the other, the other Volvo dealer?

A That's the comparison of the same number to the same number.

Q All right. And what did you figure your profit would be on that sale to Hiland Dairy?

A 3.69 percent or $2501.

Q All right. And you were contemplating 12 trucks in the transaction?

A That's correct.

[112] Q And so had you obtained that sale, what would your total lost profit on that sale be?

A Had we obtained it, we would have realized a gross profit of $30,000.

Q Let me refer you to Exhibit No. 318. First of all, let me ask you a couple more questions about that comparison we just did. Were the specs on the vehicle the same?

A Yes.

Q Was the quantity the same?

A Yes.

Q What about the trade information; were there any trades involved?

A There were no trades.

Q Was it – was there financing or cash as one of these variables?

A It was cash.

Q Was there any over allowance involved?

A There were no trades, so there was no over allowance.

Q What about the pricing strategy of the competition?

A It was identical. It was the same bid at the same time and place and time.

Q What about the timing of the transaction?

A It was at the same time. It was bid at the same time.

Q Were there any special delivery requirements that varied from the delivery requirements for the other Volvo dealer?

[113] A No. We were operating within the same timeframe. We could both get trucks in the same timeframe.

Q Was this an existing or a Conquest account?

A It was an existing account for both of us. It was not to me, but it was to the customer.

Q The customer had previously purchased Volvos?

A I'm sorry. That's what I was trying to say.

Q All right. What about extended warranties? Was there any difference in your bid and the other Volvo dealer's bid?

A No, sir.

Q Any vendor funds involved in this transaction?

A None.

Q What about customer credit worthiness? Is there any variability there between your bid and the Hiland Dairy bid?

A Same customer.

Q Now, let me refer you to Exhibit 318 – first of all, tell me what 318 is.

A 318 is a factory invoice for Hiland Dairy to Southwest Missouri Truck Center in Springfield, Missouri.

Q And, Your Honor, we move for the admission of Plaintiff's 318.

THE COURT: Any objection?

MR. WILLIAMS: Just a moment, Your Honor. Let me get that book. Okay? No objection, Your Honor.

THE COURT: It will be admitted.

[114] BY MR. BYARS:

Q This is another invoice, Southwest Missouri Truck Center for sale to Hiland Dairy. And when were these trucks – when was this truck ordered?

A The postmark date is on line 17 and it shows January 20th, 2000.

Q All right. And the postmark date on the first order of the 12 trucks was?

A Line 17, August 21st, 1999.

Q All right. What is this? What does this invoice represent?

A In our terminology, it would be what is termed an add-on order. The customer has placed an order for trucks, in this case 12, and for whatever reason they elected to extend the order. The factory accepted a single unit order in addition to the original 12, and with concession and price protection allowed the invoice price to actually be slightly less than the previous order.

Q All right. Take a look at Exhibit 318-A.

A Yes, sir.

Q What is that document?

A That is the result of a spread sheet that shows what the dealer net was and the concession amount and the, and the – in dollars, and the concession amount in percentage on that single unit order, shows it was postmarked January 20th. The bill date is March 8, 2000.

[115] MR. BYARS: Your Honor, we move for the admission of Exhibit 318-A?

MR. WILLIAMS: No objection, Your Honor.

THE COURT: It will be admitted without objection.

Q So this reflects that there was just one additional truck ordered at a later time by Southwest Missouri Truck Center?

A Yes. And I believe it reflects that the concession discount was slightly higher.

Q All right. And the concession amount was higher. On 318, the total dealer cost due was 62,652. That's for the add-on truck to the other Volvo dealer, is that right?

A If that's line 44? Yeah, that one is 62,652.

Q Right there?

A Yes.

Q You see that? And for the 12-truck order, the dealer cost due to the other Volvo dealer was?

A 62,890. That's what I'm saying, the resulting price was slightly less.

Q Okay.

A Two hundred dollars or so.

Q All right. Who was the salesman on the Hiland Dairy transaction?

A Tony Hobbs.

Q And was this new potential business for you?

A In the sales area of our business it was. It was an ongoing [116] customer in our parts and service and body shop operation.

Q All right. And this was after you moved the Volvo section over to the new, the new corner?

A Correct. And Tony was one of the salesmen that I had brought on to concentrate more on this type of business and I was assisting him in his bid on this to teach him.

Q All right. Well, during this period of time, what was going on with your old accounts, your older established accounts where you've had a history of sales?

A I was still maintaining some of the larger accounts in the area, which you would tend to call house accounts which are my accounts, but I was seeing that there were some other problems along with all of these other things going on in 1998. Like I was having what appeared to me to be competition from the manufacturer for the attention of these customers.

Q All right. You ever heard of the term direct sale?

A Yes. I believe we had reference to that in a letter in this timeframe.

Q Okay. Let me have you look at Plaintiff's Exhibit No. 62. Can you tell me what this is, please?

A This is a letter dated January 22nd, 1998, from Steven J. Larkin to all U.S. Volvo dealer principals.

Q All right. So when did you receive this letter?

A Shortly after the date on the letter.

Q All right. So January 98, how does that bear in

* * *

[123] purchased approximately 60 units over the past five years since 1996. ABF has not purchased any Volvo products within the last five years. While I appreciate and have considered your views, based on the accounts' activity, Volvo Truck remains firm in its original position that ABF will remain a national account. As for TSL, based on the information provided, we will treat this customer as a dealer account. We will continue to solicit parts and service opportunities from national accounts through the local dealer to further support our mutual benefits. Signed Steven Larkin with a copy to Stan Boris. Did Mr. Larkin address the question you had of what was meant by going on a direct basis?

A No, sir. I didn't read it in that letter.

Q The 60 trucks referred to by Mr. Larkin in the letter, what was that?

A First, the 60 trucks I now know were trucks sold by Volvo directly to TSL, but at the time of this letter –

MR. WILLIAMS: Excuse me, Your Honor. I hate to interrupt, but, Your Honor, may we approach the bench

on an issue regarding this testimony, this particular line of testimony and this question?

THE COURT: Yes.

MR. WILLIAMS: Thank you, Your Honor.

(The following proceedings were had at the Bench between Court and counsel and out of the hearing of the jury:)

[124] MR. WILLIAMS: Mr. Byars is inquiring about a 92 sale to TSL. That's clearly barred by –

MR. SHANNON: 96 direct sale.

MR. WILLIAMS: 96 direct sale. I'm sorry. That's barred by the Statute of Limitations. We think if they are going to go into it, it's only for background, and we would be entitled to a limiting instruction on this question.

THE COURT: You're shaking your head. Is that a yes, you agree?

MR. BYARS: I don't mind a limiting instruction.

THE COURT: Which –

MR. BYARS: I think the one with reference to the fact this is a franchise –

THE COURT: I have one of them which I'm calling Limited Instruction A where the Statute of Limitations has unquestionably run on both, and then the other one I'm calling Instruction B, Limited Instruction B, if it's over three years and within four years.

MR. BYARS: Uh-huh.

THE COURT: Is it A or B?

MR. BYARS: It would be I believe A. Could I take a look?

THE COURT: Yes, sir.

MR. BYARS: This says really –

MR. SHANNON: We have – it doesn't fit either one of [125] them, Your Honor. I'm sorry. It doesn't fit either one of them, Your Honor. This is a direct sale that was actually barred by your ruling that primary line discrimination is –

THE COURT: You know, the ruling had to do with, you know, primary sales and the issue of damages and whatever. I think it can go to good faith.

MR. SHANNON: Certainly. Certainly. I understand that. I'm just saying that it doesn't –

MR. BYARS: This addresses price discrimination. I think the instruction should read that this evidence relates to the issue of liability under the Franchise Practices Act, but cannot be considered for purpose of assessing damages.

MR. SHANNON: I don't think it should even be, Your Honor. It should be considered for liability, maybe background at best, but liability –

MR. WILLIAMS: Liability is three years.

MR. SHANNON: Liability is three years as well.

MR. WILLIAMS: February of 1997 is what –

THE COURT: Well, I understand, but bad faith I think that may go to damages, but I think I may allow other testimony concerning the bad faith over the life of

this. What are you saying? What instruction do you want me to give, what limiting instruction? The evidence you're about to hear what, concerns –

MR. WILLIAMS: I can't – I don't have it in front of me, Your Honor. I'm sorry. Mr. Byars looked at it and I didn't. [126] I apologize.

MR. BYARS: I believe it would concern information relating to the claim asserted by Reeder-Simco under the Arkansas Franchise Practices Act, but may not be considered for the purposes of assessing damages.

MR. WILLIAMS: Your Honor, actually I think your B is closer to what we need.

THE COURT: I think it is B.

MR. BYARS: Yeah.

THE COURT: Have you got an Exhibit you're going to put in with it or just this testimony?

MR. BYARS: Testimony.

THE COURT: You're going to get to this testimony now. You want me to give the instruction now?

MR. BYARS: I don't care.

THE COURT: All right.

MR. WILLIAMS: Well, he was already in the process of talking

THE COURT: I think he was. Okay.

(The following proceedings were had within the presence and hearing of the jury:)

THE COURT: Ladies and gentlemen of the jury, because of the evidence that you were beginning to hear and I submit will hear, I'm going to give you what's known as a limited instruction. You may consider that evidence only on the issue of [127] Defendant's bad faith and their failure to deal with the Plaintiff in a commercially-reasonable manner in connection with the Plaintiff's claim under the Arkansas Franchise Practices Act This evidence that you're going to hear and have heard may not be considered for establishing the amount of damages or as evidence of price discrimination or for any other purpose. Go ahead, sir.

Q Mr. Heck, you remember my question?

A Would you restate it so I –

Q All right.

A No, I don't.

Q The 60-truck sale referred to by Mr. Larkin, what was that?

A The 60-truck sale is a direct sale by Volvo to Trans-States Lines.

Q All right. Had Reeder-Simco previously sold trucks to TSL?

A Previously.

Q What happened to that, that sales relationship?

A That was alluded to in – that was stated in our letter to Mr. Boris. We stated that Volvo came in there and, and kind of damaged our relationship with that customer.

Q How did they do that?

A Specifically we had 120 trucks on order for TSL. There was a new president at TSL named Carl Peters. While the 120 trucks were on order, Mr. Broadmeadow came into our office and suggested that we switch the order –

MR. WILLIAMS: Excuse me. I apologize for objecting or [128] interjecting again, Your Honor, but this is another issue I think we need to approach the bench on and I apologize.

THE COURT: Who's Mr. Broadmeyer?

A Mr. Broadmeadow.

THE COURT: Broadmeadow?

A He's a national accounts representative that at that time –

THE COURT: Let's approach the bench, please.

(The following proceedings were had at the Bench between Court and counsel and out of the hearing of the jury:)

MR. WILLIAMS: Your Honor, this is an incident which occurred in 1992. Now, if anything ought to be barred, I mean there has to be some reasonable limit on how far back the Plaintiffs can go in trying to prove background. I really think this is –

THE COURT: I thought we were up to 96 or something.

MR. SHANNON: Backed up.

MR. WILLIAMS: He's backed up. He's back up to 92 now. This is ancient history, Your Honor. I think this should not be allowed and we object to it.

THE COURT: Are you telling me the sale was pending for four years?

MR. BYARS: Well, here's the problem. Where you have a representative of Volvo going in and suggesting to someone they could just simply buy direct, that lasts forever for the customer. Why would they ever go through the dealer? You know, [129] that's been mentioned. Then there's a sale in 1996 that's direct.

MR. WILLIAMS: Apart from the limitations, I think there also serious hearsay problems here since apparently Mr. Heck is talking about a meeting that occurred between Mr. Broadmeadow and TSL representatives that he didn't attend.

THE COURT: I'm going to sustain it on the basis of the hearsay then. You know, I think otherwise it very well could be relevant to the overall deal, but . . .

(The following proceedings were had within the presence and hearing of the jury:)

THE COURT: Off the record.

(Off the record at this time.)

THE COURT: Go ahead, Mr. Byars.

BY MR. BYARS:

Q Mr. Heck, who is Mr. Broadmeadow?

A Mr. Broadmeadow is currently I believe a National Accounts representative, and at various times in his past

he has been a National Accounts Representative and some form of a Regional Manager for the Southwest Region.

Q Was he a National Accounts Manager for Volvo at the time of his discussion you alluded to?

A I believe so.

Q Where did that discussion take place?

A In our dealership. We had 120 trucks on order.

[130] THE COURT: Were you present when this discussion was held?

A Yes, sir.

THE COURT: Fine.

Q All right. You had 120 trucks on order with TSL?

A We had 120 trucks on order. We had delivered 40. We were is the process of delivering the Order. The balance of the order was not coming through as scheduled. These orders have to be placed exactly so that you can do the trade-ins correctly and everything works. All right? The schedule was coming apart. We were trying to find out why. And the answer was that there had been conversation between TSL and –

MR. WILLIAMS: Your Honor, objection.

THE COURT: And I'm sustaining that. Unless you were present, unless you've heard –

A I don't know the rules. I'm sorry.

THE COURT: Well, unless you were present, you can't relate what a conversation was, unless you heard

it. That's called the hearsay exception, and I've sustained the objection. Yes, sir. Let's move on, sir.

A Mr. Broadmeadow said –

THE COURT: I don't want you to argue with me. I want you to answer the questions and only answer the questions that's been asked.

A Yes, sir.

[131] Q There was a Volvo dealership in Springdale, wasn't there?

A Yes, sir.

Q Who got the balance of that order?

A We did.

Q All right. What had happened with respect to the Springdale dealership?

A Well, they took over the sales of TSL after that transaction.

Q All right. Did Mr. Broadmeadow have anything to do with the transfer of that business to the Springdale dealership?

MR. WILLIAMS: Objection; lack of foundation.

THE COURT: Yeah. You're going to have to rephrase the question. I'm going to sustain that, but I think you can rephrase it and it may be appropriate.

Q Did Mr. Broadmeadow tell you that in your meeting with him –

MR. WILLIAMS: Objection, Your Honor, to leading.

THE COURT: Now, that's permissible. Go ahead, sir. I'm overruling that.

BY MR. BYARS:

Q Did Mr. Broadmeadow make a statement to you in your meeting concerning a suggestion that Springdale take over the business?

A Yes.

Q Now, this Exhibit 66, you wrote to Stan back in 63 when you were raising this issue about this national accounts matter. You [132] wrote to Stanley Boris, although this letter was written by Mr. Larkin.

A That's correct.

Q Why was that?

A Stan Boris, of the two people, Stan Boris was the one that we had met, that we knew face-to-face, and he was also involved in this other process that was ongoing with these probationary letters.

Q Okay. So you had met Mr. Boris?

A Yes, sir.

Q Under what circumstances did you meet Mr. Boris?

A He came to our dealership.

Q All right. When did he come to your dealership?

A I know he came to our dealership in February of 1998.

Q All right. All right. Do you recall meeting with Boris where there was a discussion concerning any desire of Reeder-Simco to – or some kind of suggestion that Reeder-Simco sell its –

MR. WILLIAMS: Your Honor, may we approach the bench again?

THE COURT: Yes.

(The following proceedings were had at the Bench between Court and counsel and outside of the hearing of the jury:)

MR. WILLIAMS: I believe the testimony is in the proof of a deposition that this meeting occurred. He didn't recall,

* * *

[134] THE COURT: You're going to have to bring yours. You need to bring your instruction.

MR. WILLIAMS: I apologize.

THE COURT: That's all right.

MR. WILLIAMS: Your Honor, I think it would be B. It would be B. I mean it's a position I'll take up with the Court when the jury is out of the room.

(The following proceedings were had within the presence and hearing of the jury:)

THE COURT: I need to give you – repeat that limited instruction I gave you just a few moments ago. The

evidence that you are hearing and are going to hear may be considered by you only on the issues of the Defendant's bad faith in their failure to deal with the Plaintiff in a commercially-reasonable manner in connection with the Plaintiff's claim under the Arkansas Franchise Practices Act. It may not be considered for establishing the amount of damages or as evidence of price discrimination or for any other purpose. You may go ahead.

MR. BYARS: Thank you, Your Honor.

BY MR. BYARS:

Q Mr. Heck, what was the discussion with Mr. Boris about?

A I told Mr. Boris that we were were not interested in selling our dealership to MHC in Kansas City, Missouri.

Q Who brought this up?

A Mr. Boris.

[135] Q Did you ever obtain any type of an offer?

A No, sir.

Q I'm going to refer you now – we need to talk about the 2000 objectives set by Volvo for Reeder-Simco, and I'm going to refer you to Exhibit No. 290. Let me just show it to you here. What is 290?

A It's a letter dated February 6, 2001, to all Midwest Regional Volvo Truck Dealers from Jack Conahan, Vice President Midwest Region.

Q All right. And contained with that Exhibit 290 there was an attachment, is that right?

A Yes, sir.

Q And what was the attachment?

A The attachment was a Review of Performance and a Statement of Objectives. It's another format of, you know, kind of like what we were looking at yesterday, business objectives, Portfolio of Criteria, but it's not labeled the same I don't think.

MR. BYARS: Your Honor, I move for the admission of Plaintiff's 290.

MR. WILLIAMS: No objection, Your Honor.

THE COURT: It will be admitted.

BY MR. BYARS:

Q Let me first take a look at this content of the cover Letter. It says to all Midwest Region Volvo Truck Dealers. What region had you been in prior to this?

[136] A Prior to this letter we were in the Southwest Region for a time.

Q Okay. What happened to the Southwest Region?

A It was closed.

Q Okay. And what happened to all the dealers who were in the Southwest Region?

A They were split up to other regions.

Q All right. And you landed in the Midwest Region?

A Yes, sir.

Q All right. Were you later in another region?

A We are now in the Southeast Region.

Q Okay. Let me take – direct your attention to this paragraph in Exhibit 290, says the number one issue in the region remains getting on to business. Regionally we remain in the business position of quoting only one-third of the business. Of that, we win one-third of the business and that equals our market share. You see that?

A Yes, sir.

Q It says our challenge this year is to review the remaining two-thirds of the business we aren't quoting and select half of those customers for quotes this year. Our target is to quote two-thirds of the total business in your AOR. There certainly is no shortage of the information to do this. Please contact your DSM if you need help with Polk or other market information. And the 2000 objectives are attached.

[137] A It's down towards the bottom, Joe.

Q I'm sorry.

A Right there. Go – yeah. See it says the 2000 retail sale goal?

Q Is that your retail sales goal right there, 60?

A Yes.

Q How about that? Does that indicate the retail sales objectives for 2000?

A Yes.

Q Does that mean 60 units?

A Yes.

Q What were your actual sales in number of units in 2000?

A I believe our records reflect eight.

THE COURT: Did you say eight?

A I said eight.

Q Now, what's your understanding with reference to winning one-third of the business? Is that talking about – how does that relate to the number of quotes that you had issued during this timeframe? What is your understanding of that?

A If I compare our sales experience over this period of time to the amount of units I was quoting on our results we're nowhere near a third –

Q All right.

A – you know, much less than a third.

Q What kind of sales would you have if you had gotten a third [138] of these trucks you quoted on in 97?

A We are starting – just tell me what number you're starting with. 947?

Q Yes.

A 312.

Q What if you got a third of the 1452?

A 479.

Q If you had gotten a third of the 1327?

A 437.

Q These are units?

A Correct.

Q How many Volvo Trucks did you sell to ABF after you filed this lawsuit?

A That's reflected in that chart. That order intake reflects 500 orders from ABF.

Q 500 units?

A Correct.

Q How many units did you sell in 1992?

A 200 – 276 or so. We would have to go and look it up just to be sure. 272.

Q 272?

A Yes.

Q Let me direct your attention now to some comparisons of your actual sales in comparison to sales made by Volvo to other dealers. We look, first of all, to Exhibit 132.

[139] THE COURT: Mr. Byars, are you going to have a series of these?

MR. BYARS: Yes, Your Honor.

THE COURT: Okay. Does anyone want – we can take a break now or we can do one in about 30 minutes. Anybody want to take one now? Why don't you go ahead, then, sir.

MR. BYARS: All right. What is Exhibit 132?

A That's a factory invoice for a Volvo tractor.

Q And it's to who?

A To Reeder-Simco.

Q All right. And, Your Honor, we move for the admission of Plaintiff's Exhibit 132.

MR. WILLIAMS: No objection, Your Honor.

THE COURT: Be admitted.

Q What was the model – who was this sale – who was the customer on this sale?

A The customer that ordered it, it was Lane Freight, a subsidiary of Link America, and we would have to look to actually see who bought the truck.

Q What kind of a transaction was this?

A It ended up being a financing lease, I believe. Some of them were cash from the customers, some were finance leases in which case the customer would be the finance lease company.

Q Well, this transaction involves a sale of trucks first to Reeder-Simco, is that correct?

[140] A That's correct.

Q And we are going to be comparing that to a sale by Volvo to another Volvo dealer?

A Yes.

Q But the end user is referenced on the invoice as Lane Freight System?

A Right.

Q But title was taken by various leasing companies, wasn't it?

A That's correct.

Q And they were located in various locations?

A Right.

Q All right. What model truck are we looking at here?

A A 1999 VNL 64 T. These are 420 sleepers, but at that particular time it was not included in the model number.

Q All right. And the dealer net on the chassis, what is the chassis? What are we referring to when we say the chassis?

A That's the base model. If you ordered no options whatsoever and just ordered one standard truck, you would get that truck as it was equipped, and it would cost the dealer $56,238 without further discounts.

Q And what's the total cost of the options on this?

A Dealer cost is $10,871.

Q And what amount of concession were you granted on this deal?

A 9 percent.

Q Let me back up a little bit and ask you how was your – how [141] was your contact made with this particular customer?

A I contacted this customer in Tulsa, Oklahoma.

Q All right. And what was the customer interested in purchasing?

A He was interested in trucks for one of their subsidiaries is Houston that pulled extremely long trailers. So that's why we used the short sleeper and he wanted some day cabs for some of his other operations, non-sleepers.

Q Did you make arrangements for the financing?

A Yes, sir.

Q That wasn't one of Volvo's obligations or concerns on this deal, was it?

A No, sir.

Q You received a nine percent concession?

A Yes.

Q When did you obtain that concession percentage? What was the process involved here?

A Well, it started in January and it proceeded through February and March, and I think we finalized the concession in larch, but we probably have an Exhibit.

Q Okay.

A I mean there's five or six pages.

MR. BYARS: Your Honor, I'm going to refer to Exhibit No. 134. This has been provided to the counsel. I move for the admission of Exhibit 134.

[142] THE COURT: Let's let them find it.

MR. WILLIAMS: Yes, Your Honor. No objection.

THE COURT: Be admitted without objection.

Q Exhibit 134 includes various forms for this concession request. Okay? And I would like to quickly just go through what the process was in getting your concession on this deal.

A Okay. Now, this particular form is for an add-on request for this customer. This is after we – excuse me?

Q Up here we're looking at 50, 60?

A It's not 134?

Q This is one – well, there are a number of pages in 134.

A I'm sorry. I'll just watch what's on the TV set.

Q Yes. Just tell the jury how this process started in requesting your concession on this transaction.

A Well, the customer was in the need of evaluating how many trucks he could afford and the process of getting rid of trucks he had, so he had to know a transaction price and a monthly cost, so he could do his budgeting and we started out, we would want to start out with the price of the truck, and I would contact my finance sources and find out what the monthly payment would be, so we were looking at different volume levels and resulting prices, and these quotations, as I recall, started – well, this one reflects something done in probably February. I can't see the date on top of it, the way you've got it.

Q All right.

[143] A But you send it in. You know, the 12.51, this particular one sticks in my mind because earlier we had been quoting the trucks based on a different pricing base, and pricing base refers to when the data book was published.

When they want to change pricing, they put a new data book out. So the previous one had a very high list price, but the concessions were very high. So they decided to lower their list prices which would allow them to lower the concessions, and so less money would be involved in having to sell these trucks. Instead of having to get back, you know, say $20,000, you could only get back 8,000, and it came out the same.

Q Now, I think you're actually referring to – this is February of 98. You're talking about the start here.

A Right. That's what I'm saying. That request –

Q This request was 26 percent?

A Right. And the request that you had up there was the one to get the same amount of money for that same deal under the new rule. That was the difference between those two slides.

Q Okay. So January of 98 you've got 50 or 60 trucks there requesting 26 percent.

A That's right.

Q And then in February of 98 you've got 12.51 percent to adjust for the price change?

A Yes. The old deal number was U538101, and the replacement deal under the new pricing rules would be V426101.

[144] Q So the 12.51 percent would give you the same dealer net price as your previous request for the 26 percent?

A That's right.

Q All right. And then – and then what happened next with the customer?

A Well, we did the – we got the concession back and it wasn't 12 and a half percent is what I recall next.

Q Okay.

A The customer had indicated interest at those figures.

Q All right. And so what – now, was there a change in the the numbers of trucks to be ordered?

A Yes. Eventually, once we knew what the prices were going to be, he decided to order 20 of the sleeper cabs and initially four of the day cabs, and then later raised it to six day cabs.

Q All right. And what is this, what does this document reflect?

A That's a further evolution in this process of going back and forth, and it shows different option content on – see the one is a 420, the first column, the next one is a 610, then a 420, and then a 610. Those are or's. In other words, would sell 20 of these or, or, or and you notice the models, the first two columns are VNM's, which is a short cab, and the next ones are VNL's which is a long cab, which would – it's different. You can see it.

Q What information did you provide to Volvo on this quote?

[145] A I gave them some background on what the customer is and son sales history; that the fleet size was such and such, the primary make they had, the engine manufacturer they were quoting and so on, when they

were going to take the bid, who the competition was on the deal, that there were no trades, and overall probability I rated it as a seven out of a ten. In other words, I was that confident that if I got the numbers I asked for, I could get the deal.

Q All right. And –

A And it's out of my area –

Q The potential fleet size on this matter was 180, they had 180 fleet vehicles in their fleet?

A At that time.

Q Why is that important?

A Well, that's one of the factors –

Q All right.

A – I believe.

Q All right. And so you first requested 12-point or 26 percent, then the 12.51 percent. And now you're at 10 percent.

A Yes.

Q And then what does this document reflect here in March of 98?

A That reflects when the, when the back and forth with the factories was over with – when all of that negotiation is out of [146] the way, and we really know what we're going to do, I wanted to confirm what it took to do the numbers that the customer was agreeing to. You know, the customer, I had given them prices and everybody's happy and that's basically what it took to confirm that.

Q Okay. And you needed 10 percent on the VNM 64 T day cabs?

A Right.

Q And 8.4 percent on the VNL 40 T 420's?

A That's right.

Q But what did you get?

A I believe I got nine percent across the board.

Q And how did that affect the deal?

A Well, it gave me a little more profit, you know, a little bit more on the sleeper cabs than what I had anticipated and it took most of my – well, it took profit away from the day cab side.

Q All right. And what did the customer decide to do?

A He decided to order more of the day cabs. He bought six of them.

Q So you wound up with nine percent on that transaction and how many trucks were involved on that deal?

A We sold 20 of the 420's and six of the day cabs.

Q Okay. When did you actually order these trucks?

A That would be the postmark date on line 17. That's April 13th, 1998.

[147] Q All right. Now, let's talk about the 20-truck part of this transaction. If you'd look at Exhibit 132-A?

A Yes, sir.

Q Who took title in these vehicles?

A We transferred title to General Electric Capital Corporation.

Q And that was the lessor on the transaction?

A That's correct.

Q With Lane Freight as the lessee?

A That's right.

Q So –

A You want to put that on the screen?

Q Sure. What is – I'm sorry. Let me first request the admission of 132-A

MR. WILLIAMS: No objection, Your Honor.

THE COURT: It will be admitted.

Q What is Exhibit 132-A?

A That is our retail invoice to the customer so we can get paid.

Q All right. And when do you submit your retail invoice to the customer?

A Most commonly immediately prior to delivery. In other words, you know, we get the money and the truck goes out.

Q All right. And this was General Electric Capital Corporation was in Tulsa, Oklahoma? I'm sorry.

[148] A No.

Q Was that – All right.

A That's the registration address.

Q Where was General Electric Capital Corporation?

A The person I dealt with was in Van Buren. The corporation itself at the time was in Boston, I believe.

Q All right. On this Lane Freight transaction, when these trucks were delivered o you, were they shipped from Greensboro, North Carolina to Ft. Smith, Arkansas?

A Yes.

Q And then were those trucks – where were those trucks actually delivered?

A Reeder-Simco delivered these trucks to Houston, Texas, these particular trucks.

Q Okay. Now, let's take a look at Exhibit 133. What is Exhibit 133?

A This is a factory invoice to a dealer.

Q Okay. A factory invoice to another Volvo dealer, is that correct?

A Right.

Q And what is the name of that dealer?

A Barrett Truck Center.

MR. BYARS: Your Honor, we move for the admission of plaintiff's Exhibit 133.

THE COURT: Any objection?

[149] MR. WILLIAMS: No, Your Honor.

THE COURT: Be admitted.

Q When in relationship to your order of the 20 trucks of the model VNL 64 T was this sale to the other Volvo dealer?

A The postmark date of the order was February 26th, 1998.

Q And yours was on April 13 of 98?

A That's correct.

Q All right. Now, let me show you – let's put these side by side here, if I could. Plaintiff's Exhibit 133 is the Barrett Truck Center, and right there where it has the model, the chassis price, and the option price, compare that to the Reeder-Simco –

A The. chassis price, which is the standard truck, is 56,238 in both cases, which indicates that the pricing level is the same.

Q All right.

A And the option pricing on the Barrett Truck Center comparison on 133, the option pricing is $10,773, and the option pricing on the trucks we sold were $10,871. So there is a hundred dollars difference between the two options out of 60 –

Q What does that tell you about these comparisons?

A They are valid comparisons.

Q Well, we have a functionally-equivalent truck –

A Yes.

Q – involved here?

A Sure.

Q Now, on Exhibit – let me have you look at Exhibit 133-A

[150] A Yes, sir.

Q What is that document?

A That's a spread sheet representing a transaction to Brookshire's Grocery.

Q Well, is this related to the same transaction to the Volvo sale at the Barrett Truck Center?

A Yes, it is, sir. The invoice we were looking at was the third truck.

MR. BYARS: Your Honor, we move for the admission of Exhibit 133-A

THE COURT: Objection?

MR. WILLIAMS: No objection.

THE COURT: Be admitted.

Q On these models, the VNL 64 T, what was the amount of the concession granted to this other Volvo dealer?

A 12.3 percent.

Q On the invoice that we received from Volvo regarding this, there is no concession amount listed on the front page of the invoice, is there?

A That's correct.

Q It's reflected on the back page of the invoice?

A Yes, sir.

Q And if we would take a concession adjustment of 8,242 to the dealer net price, that's 12.3 percent?

A Yes, sir.

[151] Q All right. Now, what was the actual dealer cost due to Barrett Truck Center on this truck? Is that right here? Listed on the invoice?

A Yes, 67,911.

Q All right. But that doesn't include the adjustment, does it?

A No.

Q The concession amount?

A Correct.

Q So subtract the 67,911 by the amount of the concession.

A It's 59,669.

Q 59,000?

A 669.

Q 669 was the net price or the total of the actual cost to this other dealer, is that right?

A That's correct.

Q Now, compare that to what your cost was.

A 62,275.

Q So what's the difference in the price charged to Reeder-Simco versus what this other dealer was able to obtain?

A Is that 62,275?

Q Yes.

A The difference is $2,606 each.

Q $2606. For your 20 trucks is the difference in price. You had to pay that much more than the other dealer?

[152] A Yes.

Q Now, multiply 2606 by 20 trucks. What is your result?

A $52,120.

Q 52,120?

A Correct.

Q For Lane Freight?

A That's correct.

Q Mr. Heck, were there any trades that complicated this deal to make your concession more difficult for Volvo?

A No, sir.

Q Was the financing a burden on Volvo?

A Not on Volvo.

Q It was financed through these leasing companies, wasn't it?

A Yes, sir.

Q Was there any over allowance involved to burden Volvo?

A No, there were no trades.

Q What about the timing of these transactions?

A They're contemporaneous.

Q Were there any special delivery requirements in this, in this matter?

A No.

Q In other words, Reeder-Simco did not request any kind of expedited delivery time for these trucks?

A No, sir.

Q Was this an existing or a Conquest account for you?

[153] A It was a Conquest account.

Q And what does that mean?

A A Conquest account is one that you've never sold before that you would like to develop a relationship with in itself.

Q All right.

A Never bought –

Q Your understanding from Volvo – how would that factor tend to apply to the concession amount?

A I would think it would give you more. That is my belief.

Q Any differences on the extended warranty of these transactions?

A No, sir.

Q Any difference in vendor funds on these transactions?

MR. WILLIAMS: Objection, Your Honor; lack of foundation.

THE COURT: It's overruled.

A We did receive vendor funds, but it did not affect the concession because it was a separate amount and it was not included. It was between Detroit Diesel and the customer and myself that paid for an option that was on the trucks.

Q All right. And what was that in particular?

A The dealer, the vendor funds were $486, and that offset the cost of the optimized idle which was a Detroit Diesel exclusive feature that Detroit Diesel wanted to get people to try out so they made it free.

[154] Q That does not relate to the concession amount, does it?

A No, sir.

MR. BYARS: Your Honor, we are about to look at another comparison.

THE COURT: Ladies and gentlemen of the jury, we're going to take – has anyone started smoking since yesterday?

JURORS: No.

THE COURT: We are going to take probably, probably a 15 or 20-minute break, and this may be the only break we have this morning. Why don't I give you 20 minutes? We'll be back at 20 till. Remember the prior admonitions of the Court not to discuss this with anyone or allow anyone to discuss it with you. If you go outside, be sure and wear your juror button, however. We are going to remain in session and seated until you're out of the room. Have a nice break and we'll see you in 20 minutes.

(The following proceedings were had outside of the presence and hearing of the jury:)

THE COURT: Let the record reflect it's 10:21. The jury is out of the room. Anything anybody wants to put on the record with the jury out of the room?

MR. WILLIAMS: No, not right now, Your Honor.

THE COURT: Mr. Byars, how many more similar dealings or similar categories or –

MR. BYARS: That was one that took a little more time because of the different concession requests. We're going to be [155] able to go more quickly. I think we are going to have one – four more of the sales-to-sales comparisons.

THE COURT: My suggestion is, in an effort to expedite matters, why don't you kind of review those with the Defendant's attorneys, if you haven't already, and make sure they have got the Exhibit numbers and we may expedite it somewhat. You're doing fine. I'm not trying to have you go any faster than you should, but I think this is something that maybe can be expedited and a lot of the questions, too, that you ask, perhaps there may be some way – you may do it by agreement where we can have all

four of those transactions sort of in evidence and then ask the same general questions about all of them. But that's something you-all can work out. I had previously – we have got two limiting Instructions A and B. I think we agreed that those would be the instructions we would use. What I think you ought to do on the break, too, is see if you can find yours. If you can't, I'll make you new ones, and then number yours like mine, A and B, and then if you want limited instruction A, you simply say A, or if you want B, say B. I'll leave those with Miss Porter and you can do that during break. Have a nice break and I'll see you in about 16 minutes.

MR. BYARS: Judge, I need to – made a misstatement there. We've got four more on sales-to-sales, but then we'll have some that were non-sales comparisons.

THE COURT: I didn't get encouraged so . . .

[156] MR. BYARS: All right.

(Off the record at this time. The following proceedings were had within the presence and hearing of the jury:)

THE COURT: You-all have a good break? We'll probably go till about noon and then we'll go see if Trio's is open today. You also, we do have a lot of Exhibits in this case and they're being put on the big screen, but when you do go back to deliberate, all of these will be bundled up, put in order and taken back with you. We're hoping that the jury room is large enough. But the Exhibits you're going to have, and we'll get them all back to you. Go ahead, sir.

BY MR. BYARS:

Q Thank you, Your Honor. Mr. Heck, back on this Lane Freight deal, we need to finish that one up. Didn't you attempt to add on a few trucks on this 20 some odd truck deal for Lane Freight?

A Yes, sir.

Q And when did you do that?

A I made the request June 23rd to add on to the order to get additional orders or concession for additional orders.

Q And, that was within what timeframe of the initial order and delivery of those trucks approximately?

A It was right around 60 days I think. Would that be close enough?

Q All right. And you had gotten nine percent concession on the truck we compared?

[157] A Yes.

Q Let me show you what's been marked as and admitted as Plaintiff's Exhibit No. 134. What is this?

A That is the special price confirmation concession request for the add-on order as specified down in the comments.

Q Okay. So you were looking to add on four more trucks to this deal, the same model?

A They're the same truck.

Q Same truck and you requested your nine percent that you had got previously?

A Just keep everything the same.

Q What were you approved for?

A Seven percent.

Q What did the customer say when you went back to the customer?

MR. WILLIAMS: Objection, Your Honor.

THE COURT: I think that's probably relevant. I'm going to overrule it.

MR. WILLIAMS: I'm sorry, Your Honor?

THE COURT: I'm overruling it. I think he can answer that. Ask what the customer did. You can't say what he said.

MR. BYARS: Thank you, Judge.

Q First of all, let me ask you what did you have to do in light of not getting the nine percent?

A I had to raise my price, since I had not received the [158] concession I needed on this particular model before and my profit was already below $600. On this reduction concession, I would have lost money to sell them this truck, and I raised the price and he did not place this additional order for four trucks.

Q All right. You believe you would have gotten the order had you gotten the same concession you did before?

A Yes. It was to add four more trucks. to the order. It was already agreed to.

Q And what did you mention that your profit was figured out for the 20 you did sell?

A The 20 I sold?

Q Well, the –

A The six.

Q The per truck profit you had figured.

A On the six day cabs that we had already placed on order, our profit was between five and $600 per truck is my best recollection.

Q All right. And so your lost profit as a result of this transaction of the four trucks was four times what your prior profit was?

A Potentially $2,400, somewhere in that neighborhood.

Q But how did that bear with regard to the relationship with this customer that had 180 trucks in his fleet?

A It damaged our relationship.

Q Did you get any more orders from this customer?

[159] A No.

Q Now take a look at Exhibit 130.

MR. WILLIAMS: No objection, Your Honor.

THE COURT: Good. Be admitted without objection. See sometimes I don't have much of a role in this thing at all.

Q Exhibit 130 is an invoice to Reeder-Simco by Volvo for a sale to the City of Ft. Smith, isn't it?

A That's correct.

Q And when did you order these trucks?

A Postmark date is 2/10/97.

Q And what kind of truck were you selling to the City of Ft. Smith?

A A dump truck.

Q That's the model of a 1997 model WG 64?

A Right.

Q What was the concession amount that was granted to you by Volvo on this order?

A 19 percent.

Q All right. Now, look at the total dealer net 63,785, is that right?

A Yes, line 32.

Q And this was for the sale of two trucks, is that right?

A Yes.

Q As shown on Exhibit 130 and 130-A, and that consists of two pages and these are your – these were your retail invoices to [160] the City of Ft. Smith?

A That's correct. That was two truck orders.

Q All right. Now, take a look at what's been marked as Exhibit 131. Your Honor, we move for the admission of 131.

THE COURT: It will be admitted without objection.

Q This is an invoice from Volvo to Westfall Volvo for sale to Rapidway's Wallsworth, and what is the model?

A 1997 WG 64.

Q Same truck?

A Yes.

Q And what was the dealer net for this 63,736, which is very close to your dealer net?

A Within $50.

Q All right. Now, what we do with the dealer net is you reduce that by the concession, correct?

A That's right.

Q And you got 19 percent?

A Right.

Q What did this dealer get?

A 21 percent.

Q And if we compare the timeframe, this dealer got 21 percent December 17, 96 –

A Yes.

Q – in comparison to your order less than three months later on February 10, 97, is that right?

[161] A That's correct.

Q Now, when you ordered – you purchased these trucks from Volvo, right?

A Yes.

Q And Volvo makes these trucks where?

A At New River Valley, VirginiA

Q All right.

A NRV they call it.

Q So were those trucks shipped from the plant in Virginia to the City of – to Ft. Smith for delivery to your customer?

A Yes.

Q Take a look now at Exhibit 128.

MR. BYARS: Your Honor, we offer Exhibit 128.

MR. WILLIAMS: No objection to 128 or 129, Your Honor.

THE COURT: 128, 129.

MS. PORTER: What about 130-A he talked about?

THE COURT: Are you going to go back to 130-A? Was there some discussion of it or –

MR. BYARS: I don't believe so, not right now.

THE COURT: Okay.

MS. PORTER: 130-A

Q Exhibit 128 is an invoice from Volvo to Reeder-Simco for a sale to New-Hiway Express, isn't it?

A We resold the vehicle to New Hi-way Express.

Q Reeder-Simco purchased the trucks from Volvo?

[162] A Yes, sir.

Q We're going to compare that to another deal where a different dealer purchased trucks from Volvo, right?

A Yes.

Q How many trucks were involved in this transaction?

A For sale to New Hi-way Express was an 85-unit order.

Q Okay. And that's shown here on Exhibit 128-C, is that correct?

MR. BYARS: We offer Exhibit 128-C.

THE COURT: It will be admitted without objection.

MR. WILLIAMS: Your Honor, we think this is a, if I may say, an appropriate place for a Limiting Instruction A.

THE COURT: Okay. And I've lost Limited instruction No. A The evidence you're about to hear concerns instances of alleged price discrimination that occurred too long ago to be considered by you for any reason except on the issue of Defendant's bad faith.

MR. SHANNON: Just a minute. I'm sorry.

MR. WILLIAMS: We misspoke. I apologize to the Court for that. May we approach the bench on this just to clarify and hope we get this straightened out?

THE COURT: Yeah.

MR. BYARS: Yes, Your Honor. This transaction occurred in November of 1996 through –

THE COURT: I think, I think –

[163] MR. BYARS: – into July of 97.

(The following proceedings were had at the Bench between Court and counsel and out of the hearing of the jury:)

MR. WILLIAMS: I apologize, Your Honor, we'll get straight on this. If it occurred in November of 96, it's barred under the Franchise Practices Act.

THE COURT: That's right, so, therefore, it ought to be under B then.

MR. BYARS: Well, Your Honor, these trucks – Volvo began invoicing Reeder-Simco December of 1996 and did not complete invoicing Reeder-Simco until June of 1997.

THE COURT: This is what the 80 trucks or the 85 trucks?

MR. BYARS: Yes.

MR. SHANNON: The price was set, you know, long before the 1296, you know, no change in the concession amount.

MR. WILLIAMS: Right.

MR. SHANNON: The postmark date for all of these trucks was the same prior to 12/96 and they started invoicing them prior to 12/96, so the fact that they may have finished the order, finished billing the trucks shouldn't bring this into the timeframe of the Franchise Practices Act.

MR. BYARS: Even though the price may have been set at an earlier date for this transaction, there was no damage until after the trucks were actually delivered. Volvo has admitted in [164] other evidence already admitted that they consider a sale to occur when the warranty registration occurs –

MR. WILLIAMS: I thought we had already – I'm sorry. Go ahead. I apologize.

MR. BYARS: In addition –

THE COURT: Well, from what I have, Mr. Byars, I'm going to admit it, but only admit it if I give instruction B here or limiting instruction B.

MR. BYARS: Right.

THE COURT: I think it is barred, at least part of it, by the Statute of Limitations.

(The following proceedings were had within the presence and hearing of the jury:)

THE COURT: The evidence you're about to hear may be considered by you only on the issue of Defendant's bad faith and their failure to deal with Plaintiff in a commercially-reasonable manner in connection with the Plaintiff's claim of the Arkansas Franchise Practices Act and may not be considered . . . I think I'm going to give A.

MR. SHANNON: We were discussing that, Your Honor. I don't know that either one of them are completely appropriate.

MR. BYARS: Could we approach, Your Honor?

THE COURT: Yes, you may. I have two Limiting Instructions, A and/or a B. And I may have to get a C it looks like.

[165] (The following proceedings were had at the Bench between Court and counsel and out of the hearing of the jury:)

MR. BYARS: These are sales-to-sales comparisons, four year statute on that.

THE COURT: I agree with you.

MR. SHANNON: Your Honor –

THE COURT: It's over three years and within four years.

MR. SHANNON: Right.

MR. BYARS: Yes.

THE COURT: All right. So I think it does go to Defendant's –

MR. SHANNON: The last sentence of B is what is the problem.

MR. WILLIAMS: Now it says down to I think A.

THE COURT: I think we can give B then without the last sentence.

MR. WILLIAMS: Your Honor, I think to be fair I think we probably do need a C. I think we need a C. That covers the situation here. You've got a claim –

THE COURT: I agree.

MR. WILLIAMS: – that is under the Robinson-Patman Act, but is barred under the Franchise Act. I don't think we have anything that addresses that.

THE COURT: I don't think we do either. (Pause) Guys, [166] I'm proposing a C to say the evidence you're about to hear may be considered by you on the issue of damages of price discrimination under federal law, but may not be considered on the issue of damages under the Arkansas Federal – or the Fair Franchise Practices Act. However, it may be considered on the issue of bad faith and on the failure to deal with the Plaintiff in a commercially-reasonable manner in connection with the Plaintiff's claim under the Arkansas Franchise Practices Act.

MR. WILLIAMS: The last sentence dealing with the bad faith, Your Honor, if I'm understanding the Court's ruling is that it's relevant only on the issue of the background motive opportunity, and I have a concern that the jury is going to hear that it's relative on the issue of bad faith. That they're going to think it's a a predicate on which they can actually find liability.

THE COURT: I'm actually putting it is not to be considered for damages.

MR. WILLIAMS: Okay. Okay. I'm sorry. I just heard "it."

THE COURT: It may not be considered on the issue of damages under the Arkansas –

MR. WILLIAMS: Okay.

THE COURT: I'm going to do this as C. Do you-all want to think about this some more? You all want me to have it typed and look at it?

[167] MR. WILLIAMS: I would like to see it so we don't have to address it again, Your Honor, if possible.

THE COURT: Well, we can have it typed. Let me, Jody, Mr. Byars, don't leave just yet, but let me read it for you and after I read it, I'll have her go type it and circulate it. The evidence you're about to hear may be considered by you on the issue of damages of price discrimination under federal law, but may not be considered on the issue of damages under the Arkansas Franchise Practices Act. However, it may be considered on the issue of bad faith and on the failure to deal with Plaintiff in a commercially-reasonable manner in connection with Plaintiff's claim under the Arkansas Franchise Practices Act, and that's C.

MR. WILLIAMS: I think that's okay.

THE COURT: Any objection? Does that take care of it?

MR. SHANNON: Other than our other objections that it shouldn't be used even on that –

MR. WILLIAMS: Right, right.

THE COURT: I know you think we shouldn't be here at all.

MR. WILLIAMS: Just keeping our record, Your Honor.

THE COURT: Right.

(The following proceedings were had within the presence and hearing of the jury:)

THE COURT: What I suspected was in fact the case. We now have a Limiting Instruction C. The evidence you're about to [168] hear may be considered by you on the issue of damages for price discrimination under federal law, but may not be considered on the issue of damages under the Arkansas Franchise Practices Act. However, it may be considered by you on the issue of bad faith and the failure to deal with the Plaintiff in a commercially-reasonable manner in connection with the Plaintiff's claim under the Arkansas Franchise Practices Act. All right. Now you may proceed.

Q Mr. Heck, tell me what Plaintiff's Exhibit 128-C is.

A That's a spread sheet reflecting the trucks ordered by Reeder-Simco – well, part of the order for New Hi-way Express. This photo here is probably 81 trucks.

Q All right. At the third page of 128-C, that includes a different order number. Is that what you were referring to?

A Yes. And the fact that the concession amount is different.

Q Okay. With regard to the VNL 64 T 610's which were ordered by Reeder-Simco for sale, when did Volvo begin to invoice Reeder-Simco for the sale of these trucks?

A The invoice date on the first truck, which is serial number, 738633, the invoice date of that truck is December 10th, 1996.

Q All right. And what was the invoice date of the last truck in this same transaction?

A What started as the same transaction would be serial number 738713. That's Exhibit 128-A. And the invoice date on 738713 is June 18th, 1997.

[169] Q Okay. That's shown here on Exhibit 128-A as –

A Yes.

Q – June 18, 1997.

A Line eight.

Q Why is it that – let me ask you this: When are the trucks warranty registered?

A When they are placed in service.

Q All right. And they can't be placed in service until you receive delivery of the trucks, correct?

A Till I get them, sure, of course.

Q When do you invoice in relationship to the delivery date by Volvo?

A Prior to.

Q All right. Well, would your invoices to your customer reflect when these vehicles were warranty registered at or near that time?

A Yeah, yeah, within days I would expect.

Q All right. Let me refer you to Exhibit 128-B, and move for the admission of that Exhibit.

THE COURT: Any objection?

MR. WILLIAMS: No objection to the Exhibit, Your Honor.

THE COURT: Be admitted without objection.

Q On this transaction, Mr. Heck, did Reeder-Simco invoice the customer for the sale of trucks on this transaction as late as November 3 of 1997?

[170] A No.

Q Okay. Let me hand you these documents 128-B.

MR. WILLIAMS: 128-B, is that what you're using now?

MR. BYARS: Yes.

MR. WILLIAMS: Okay.

Q You need to ascertain from these documents when you last invoiced the customer for this transaction. Would you do that, please?

A You want to know when I last did it?

Q Yes.

A June 9th, 1997.

Q Okay. Thank you. All right. Let me show you again Exhibit 128-A. What type of truck was being sold here?

A A – I just want to get the model year straight. These are 1998 model VNL 64 T Volvo, VN's.

Q All right. And what was the amount of the concession you received on this transaction?

A 24.2.

THE COURT: Is this 128-A now we're on, Mr. Byars?

MR. BYARS: Yes, Your Honor.

THE COURT: Was that introduced?

MS. PORTER: No.

MR. BYARS: Yes.

THE COURT: It was not.

MS. PORTER: 128 was.

[171] A I think it's 128.

MR. BYARS: We move for the admission of 128.

MR. WILLIAMS: No objection to 128.

THE COURT: Or 128-A.

MR. WILLIAMS: Or 128-A.

THE COURT: Fine. They will both be admitted.

MR. BYARS: Thank you.

Q Now, let me direct your attention to Plaintiff's Exhibit 129. We move for the admission of 129.

THE COURT: Any objection?

MR. WILLIAMS: No objection.

THE COURT: Be admitted without objection.

Q This is an invoice from Volvo to Ball Volvo and GMC Trucks for a sale – resale to Harold Dicky Transport, is that right?

A That's right.

Q And what type of trucks are being sold to that dealer?

A 1998 VNL 64 T VN Volvo's.

Q And what was the amount of the concession granted to this other Volvo dealer?

A 27.3 percent.

Q And you received 24.2 percent?

A That's correct.

Q Take a look at Plaintiff's Exhibit 129-A. We are ready for the admission of Exhibit 129-A.

MR. WILLIAMS: No objection.

[172] THE COURT: Be admitted without objection.

Q How many trucks did this other Volvo dealer purchase according to this Exhibit?

A Ten.

Q In comparison to your 80 truck deal?

A Yes.

Q Now, what was the total net cost to the other Volvo dealer as a result of that transaction or that concession amount? Is it shown here on Plaintiff's Exhibit 129 as 64,220?

A Yes, Line 43 of Exhibit 129.

Q And total dealer cost due on your sale was 25,280?

A No. Total dealer cost on ours?

Q Yes.

A 66,719.

Q That's shown on Plaintiff's Exhibit 128-A?

A 128-A, line number 43.

Q And that's the invoice reflecting the 25.2 percent concession on the chassis and 25.4 percent on the options?

A Correct.

Q Okay. What is the difference in your dealer cost and the dealer cost to the other Volvo dealer when theirs was 64,220?

A $2499 each.

Q So you paid that amount more than the other Volvo dealer?

A Correct, each.

Q All right, per unit. So what's the – if you multiply that [173] difference by the number of trucks you sold, what is the number?

A $192,423.

Q Let me direct your attention to Exhibit 124. We move for the admission of Exhibit 124?

MR. WILLIAMS: No.

THE COURT: Any objection?

MR. WILLIAMS: No objection, Your Honor.

MR. BYARS: Exhibit 124.

THE COURT: 124 will be admitted.

Q This is an invoice from Volvo to Reeder-Simco for the sale of what type of truck?

A 1997 WG64T.

Q All right. And what was the postmark date on that transaction?

A February 13th, 1996.

Q And what was the invoice date on that transaction?

A Line eight is April 17th, 1996.

Q What was the – look at Exhibit 124-B. We move for the admission of 124-B.

MR. WILLIAMS: No objection, Your Honor.

THE COURT: It will be admitted.

Q What was the amount of your – of the concession granted to Reeder-Simco in that transaction?

A 13.27 percent.

Q That's on a three-truck deal?

[174] A Yes.

Q Now, take a look at Exhibit 125. Your Honor, we move for the admission of Exhibit 125.

MR. WILLIAMS: Your Honor, may I inquire? I think we are still under the limiting instruction C that was read earlier I think this applies as well.

THE COURT: All right.

MR. WILLIAMS: I don't know if it needs to be read, but I just want to note that for the record.

THE COURT: Fine. I'll be happy to read it again if you –

MR. WILLIAMS: No, I think maybe given it's a new instruction, the jury might appreciate hearing it again.

THE COURT: The evidence you're about to hear again may be considered by you on the issue of damages for price discrimination under federal law, but it may not be considered or the issue of damages under the Arkansas Franchise Practices Act. However, the evidence may be considered on the issue of Defendant's bad faith and their failure to deal with Plaintiff in a commercially-reasonable manner in connection with Plaintiff's claim under the Arkansas Franchise Practices Act. Proceed, please.

Q Exhibit 125. Has that been admitted?

THE COURT: Yes.

MR. BYARS: Okay.

[175] THE COURT: Yes. It will be admitted.

BY MR. BYARS:

Q Bill, this is an invoice from Volvo for another Volvo dealer, Westfall Volvo GMC Trucks in Kansas City, is that right?

A That's right.

Q And what type of truck is being sold here?

A A 1997 WG64T.

Q That's the same model number as the truck sold to Reeder-Simco?

A Yes, sir.

Q What was the – now, take a look at Exhibit 125-A.

A Yes.

MR. BYARS: Move for the admission of 125-A.

THE COURT: Any objection?

MR. WILLIAMS: No objection.

THE COURT: Be admitted.

Q What does 125-A reflect?

A It reflects that it's a one-truck deal and it's a concession amount of 18.04 percent.

Q All right. And that 125-A relates to this sale by Westfall or from Volvo to Westfall for the City of Excelsior Springs?

A That's correct.

Q And that occurred in September of 1996, is that right?

A The postmark date is September.

Q September. Okay. And they received an 18.4 percent [176] concession, is that right?

A Correct.

Q The dealer cost, if you look at the second page of Plaintiff's Exhibit 125. As a result of that 18.4 percent

concession, the total due to that other Volvo dealer was or by that – the other dealer had to pay 44,803, is that right?

A That's right.

Q And how much did Reeder-Simco have to pay on that transaction?

A By comparison to 124, Sam Ludington?

Q Yes.

A 56,467.

Q And what's the difference between those two prices?

A $11,624.

Q There were two trucks sold, right?

A Two, Sam Ludington.

Q Yes, or was it three?

A I thought it was three. It is three.

Q All right.

A It's not two.

Q All right. Where is that – is that indicated on your invoices to the customer, Exhibit 124-A?

A 124-A reflects three invoices, detail invoices to Sam Ludington from Reeder-Simco for trucks.

MR. BYARS: All right. We move for the admission of [177] 124-A.

THE COURT: Any objection?

MR. WILLIAMS: No objection.

THE COURT: Be admitted 124-A.

Q Three trucks were sold. If you do the math, what's three times the difference in the price?

A $34,872.

Q If I could direct your attention to Exhibit 126 and 126-A.

A Yes.

MR. BYARS: Your Honor, we move for the admission of those two exhibits.

THE COURT: Any objection to 126 and 126-A?

MR. WILLIAMS: No, Your Honor.

THE COURT: Admitted without objection.

Q Mr. Heck, this is other invoice by Volvo for a sale to a different Volvo dealer, Griffin Volvo Truck Center. Inc, for the same type of truck that we dealt with on your sale to Sam Ludington, is that correct?

A That's correct.

Q And take a look at Exhibit 126-A. What was the amount of concession granted to the other Volvo dealer –

A Fifteen-point –

Q – on a two truck transaction?

A 15.42 percent.

Q Greater concession than yours?

[178] A Yes.

Q And what was the postmark date of this sale or the invoice date by Volvo to Griffin Truck Center?

A Well, the postmark date is April 9th, 1996, and the invoice date would be line eight, is June 6th, 1996.

Q All right. And what were the dates of your sales?

A Postmark date was February 13th, 1996, and the invoice date was April 17th, 1996.

Q All right. And when you purchased these trucks from Volvo, were those trucks shipped from the plant in – I'm sorry – is it Virginia?

A It's in Virginia.

Q Were those trucks shipped from Virginia to Ft. Smith, Arkansas?

A Yes, sir.

Q For delivery to your customer?

A Yes.

Q And where were those delivered?

A Just a second. I don't remember. We delivered those to Wilburton, Oklahoma.

Q All right. Now, I need to ask you those same questions. I don't think I asked you that with respect to your sale to New Hi-way Express, the 80-truck transaction. Were the vehicles on that 80-truck transaction shipped from Virginia to Ft. Smith for delivery to your customer?

[179] A Yes, sir.

Q And where were those truck delivered by Reeder-Simco?

A Some to Arkansas, some to Oklahoma, some – they went to various places.

Q All right. Let me have you take a look at Exhibit 127. We move for the admission of Exhibit 127.

THE COURT: Any objection.

MR. BYARS: 127-A.

MR. WILLIAMS: No objection, Your Honor.

THE COURT: 127 and 127-A are both admitted.

Q Exhibit 127 is a copy of an invoice from Volvo to another Volvo dealer, General Truck Sales and Service of Memphis, is that right?

A Yes.

Q And that's for a resale to Dalton Petroleum, is that correct?

A Yes, sir.

Q And what type of truck are we dealing with in that transaction?

A A 1996 WG64T.

Q All right. And what was the amount of the – if you look at Exhibit 127-A, what was the amount of concession that this other dealer received?

A 14.53 percent, one truck.

Q And that was a greater concession amount than your three-[180]truck transaction to Sam Ludington?

A Yes.

Q Take a look at Exhibit 121.

MR. BYARS: I move for the admission of Exhibit 121.

THE COURT: Any objection?

MR. WILLIAMS: Yes, Your Honor. We do object. We think this one is subject to a limiting instruction. We move this transaction would be subject to Limiting Instruction A.

THE COURT: Mr. Byars, you in agreement with that?

MR. BYARS: Just a moment, Your Honor.

THE COURT: What's the number of this one, Holly?

MS. PORTER: 121.

MR. BYARS: I believe that's correct, Your Honor.

THE COURT: Are you moving to admit 121 and 121-A?

MR. BYARS: Yes, Your Honor. And there's also 121-C.

THE COURT: Same objection to all of them?

MR. WILLIAMS: Yes, Your Honor; same objection.

THE COURT: The evidence you're about to hear concerning Exhibits 121, 121-A, and 121-C concern instances of alleged price discrimination that occurred too long ago to be considered by you for any reason except on the issue of Defendant's bad faith and their failure to deal with the Plaintiff in a commercially-reasonable manner in connection with the Plaintiff's claim under the Arkansas Franchise Practices Act. It may not be considered for establishing the amount of [181] Plaintiff's damages or as any evidence of price discrimination under federal law or for any other purpose. Go ahead, sir. And I'm admitting it on that basis, those exhibits.

MR. BYARS: I'm sorry, Your Honor. On what – what instruction was that? Was that C?

THE COURT: A.

MR. BYARS: I disagree with that, Your Honor.

THE COURT: Why don't we approach the bench then?

(The following proceedings were had at the Bench between Court and counsel and out of the hearing of the jury:)

MR. BYARS: I'm sorry, Your Honor, but this transaction involves the sale to Reeder-Simco where the invoicing actually began January 24, 96, on the first truck.

THE COURT: Hang on one second.

MR. BYARS: But the invoice dates for the majority of the trucks fall on or after – well, there's one February 9, 1996, and then the rest of the trucks were not invoiced until February 15th, 1996, and after –

MR. SHANNON: They were ordered.

THE COURT: Well –

MR. SHANNON: I'm sorry.

THE COURT: Is one of them January 24th. Is that when they started? Is that what you said?

MR. BYARS: Yes, January 24, 1996, was the invoice date. These transactions were not completed and Reeder-Simco did [182] not invoice its customers until after –

THE COURT: Well, I'm going with the earlier invoice date, you know, and it was January 24th, and I've lost the notebook I had when this case was filed January 27th or 28th.

MR. WILLIAMS: February 9, and actually, Your Honor, it was postmarked, the date that Reeder-Simco submitted its Order was in November 95, November 17. We think that's the operative date for the limitations.

THE COURT: I think, therefore, under the Court's ruling, I think Limiting Instruction A is correct. I'll give you a objection and a continuing exception with reference, with reference to the Statute of Limitations. If we have others, it may may save us another trip up here.

MR. BYARS: Yes.

MR. WILLIAMS: The next one is the same, I believe is the same situation, falls in the same period.

THE COURT: I will give the Limiting Instruction A over your objection.

MR. BYARS: Yes, sir.

THE COURT: I'll do that at this time.

MR. WILLIAMS: Your Honor, as a housekeeping matter, would it be acceptable if we could put this on the ELMO so they could read along as you read it?

THE COURT: No. Let me read it. What I'll probably do is send it back with them.

[183] MR. BYARS: Fine. That's fine.

(The following proceedings were had within the presence and hearing of the jury:)

MR. BYARS: I believe 121-A, B and C have been admitted.

THE COURT: Yes, subject to the Limiting Instruction that was given.

MR. BYARS: Yes, Your Honor.

Q 121 is an invoice from Volvo to Reeder-Simco concerning the sale of model 1996 WIA 64 TTES, is that right?

A Yes.

Q And 121-C reflects that this involves the sale of how many trucks?

A Looks like it would be 20, without counting them all.

Q Okay. Do you recall a transaction involving 20, a 20-truck transaction to New Hi-way Express?

A Several. This is one of them.

Q All right. And what was the amount of the concession granted to Reeder-Simco on the sale of these trucks?

A 19.22.

MR. BYARS: Now, Your Honor, we move for the admission of Plaintiff's Exhibit 122 and 122-A.

MR. WILLIAMS: No objection, subject to the limiting instruction, Your Honor.

THE COURT: Yes, I would repeat then the same limiting [184] instruction that I gave you before. Go ahead, sir. Admitted on that basis.

Q Mr. Heck, Plaintiff's Exhibit 122 is a copy of an invoice from Volvo to Westfall Volvo for the sale of model 1996 WIA 64 TTES, is that correct?

A Yes, sir.

Q And if you look at Exhibit 122-A, how many trucks were involved in this transaction, five?

A Five.

Q So Westfall Volvo purchased five of these trucks from Volvo, and when was the postmark date on that transaction?

A June 21st. 1995.

Q And what was the amount of concession received by the other dealer?

A 23.73.

Q And that compares to the amount granted to Reeder-Simco of what?

A On this one 20-truck deal it was 19.22.

Q All right. Now, there is a difference I guess in the model number on, this truck, is that correct?

A Yes, there is.

Q One is a WIA 64 TES. One of them has an additional T in there?

A That's right. That is right.

Q Now, you've seen what we have referred to as matrix [185] documents in this case, is that right?

A Yes, I have.

MR. BYARS: Your Honor, I'm going to move for the admission of the matrix documents which have been marked as Plaintiff's Exhibit 93, 94, 95, 96, and 97.

THE COURT: Any objection?

MR. WILLIAMS: Your Honor, if I may have just a moment. Mr. Byars told me, but that's why I was not quick on the response. I'm sorry. Can you give me the numbers?

MR. BYARS: 93 through 97.

THE COURT: 93 through 97.

MS. PORTER: I already have 97 in.

MR. WILLIAMS: Your Honor, we don't object to the authenticity of the documents. We object to their relevance, because all of the documents that he's dealing with are 98 documents and this transaction is back several years before that.

THE COURT: I'm going to let you cross examine when the time presents itself, but they will be admitted as Exhibits 93 through 97.

Q Mr. Heck, would you look at those Exhibits? Those are what are considered to be matrix documents that we were able to obtain from Volvo.

A I'm not caught up yet. Ninety –

Q Just put one of them on the screen here.

A Ninety who? Six?

[186] Q You can see 96 here.

A Yes, I can.

Q With regard to the models, is there any distinction made between W I A T T E S and W I A T E S?

A Not on that chart.

Q On any of the matrix documents that you've been able to locate, is there any type of distinction made between those two models?

A I don't recall there being one.

Q Is the W A model a comparable model to the W I A?

A It depends upon what year to be honest with you.

Q All right. I believe there are a couple of other matrix documents that we will look at in a moment. I don't want to take up the time to do that right now. Let me direct your attention to Exhibit No. 117. We move for the admission, Your Honor, of Exhibits 117-A and B or 117-A and 117-B and Exhibits 118, 118-A, 119 and 119-A.

MR. WILLIAMS: Your Honor, we don't object to the documents. We previous – pursuant to our previous conference, we did request a limiting instruction A be given.

THE COURT: Okay. Fine. I'm going to admit Exhibits 117, 117-A, 117-B, 118, 118-A, 119, and 119-A subject to the following limiting instruction: The evidence you're going to hear on these exhibits concerns instances of price – alleged price discrimination that occurred too long ago to be considered by you [187] for any reason except on the issue of Defendant's bad faith and their failure to deal with the Plaintiff in a commercially reasonable manner in connection with Plaintiff's claim under the Arkansas Franchise Practices Act. It may not be considered for establishing the amount of Plaintiff's damages or as evidence of price discrimination under federal law or for any other purpose. On that basis, they're admitted. Go ahead, sir.

Q Bill, is Exhibit 117 a copy of the invoice from Volvo for a sale to Reeder-Simco?

A Yes, sir.

Q And that's for a 1996 model WIATES, is that correct?

A WIA 64 TES, that's right.

Q All right. And what was the postmark date of this transaction?

A August 17, 1995.

Q All right. And take a look at Exhibit 117-A, does that reflect the number of trucks that were in this deal sold by Reeder-Simco?

A Yes.

Q And over on the far right column there are invoice dates. Those would be the dates which Volvo invoiced Reeder-Simco, is that correct?

A That's right.

Q And Exhibit 117-B would reflect when Reeder-Simco invoiced its customer, is that right?

[188] A That's right.

Q And that was December 29, 1995?

A That's right.

Q And tell me about this customer. Where are they located, how did you make the contact?

A Distribution services is located, they're domiciled in Little Rock as well as Memphis, Tennessee. And the original contact was through an acquaintance of mine. And then I called on them in Little Rock. And they're –

Q In regard to this transaction, what concession amount was received by Reeder-Simco?

A 20.3.

Q All right. Let me have you look at Exhibit 118. This is an invoice from Volvo for the sale of a 1996 WIA 64 TES to the Volvo dealer, Westfall Volvo in Kansas City, is that right?

A Right.

Q And Exhibit 118-A reflects the number of trucks involved in this transaction, doesn't it?

A Yes, it does.

Q And, what was the concession amount granted to this other dealer?

A 22.4.

Q Which is a higher concession or a greater discount than what you received for your, what, 20-truck deal?

A Yes.

[189] Q How does that affect the price? Obviously the higher the discount to the other dealer, the lower the price to the other dealer, right?

A That's correct.

Q Does that apply to all of these examples that we have gone through?

A What, the fact that the concession affects the price to the dealer?

Q Yes. That the other – with regard to all of these comparisons that we have made, that the higher concession amount granted to the other dealer resulted in a lower price to the other dealer than to Reeder-Simco in those comparisons?

A Yes.

Q And with respect to all of these transactions where Reeder-Simco purchased trucks from Volvo, all of these trucks were shipped across state lines, weren't they?

A Yes.

Q Bill, do you compete with these other Volvo dealers?

A Sure.

Q How do you compete with these other Volvo dealers?

A We operate on the same customers, so that many times our customers are liable to check my price at another dealership before they go ahead and give me an order. I could be dealing with a transient customer that comes through my place and they go to Dallas or Kansas City. Happens all the time.

[190] Q With regard to all of these transactions, these all deal with information that we were able to obtain from Volvo which was restricted to the Southwest Region, is that correct?

A The data we've looked at has been restricted to the Southwest Region.

Q All right. And so all of these comparisons that we've dealt with and that we will deal with in a moment concern transactions within the Southwest Region?

MR. WILLIAMS: Your Honor, I'm sorry. I object. That's the fourth leading question in a row I've heard and I object to that. It's his witness.

THE COURT: Yeah. Maybe you can rephrase the question. I'll sustain the objection.

Q Where were the other dealers located with respect to the comparisons we've just done?

A All of the dealers in the comparisons we have studied are also within the Southwest Region.

MR. BYARS: Your Honor, I'm going to request the admission of Defendant's Exhibit 249. It's a little prettier than mine.

MR. WILLIAMS: Your Honor, we always like compliments on our Exhibits. We'll agree with him. We have no objection.

THE COURT: Yeah. We will admit pretty Exhibit 249 as Defendant's Exhibit, but it's being – it's coming in as a Plaintiff's Exhibit.

[191] Q Bill, is that a map of the Southwest Region?

A Yes.

Q Are there any significant types of trade barriers among customers within this region?

A No, sir.

Q And have you actually shipped Volvo trucks throughout this region?

A Yes.

Q Ship trucks to Houston?

A Excuse me?

Q Ship trucks to Oklahoma?

A Sure. I just – I haven't done Mississippi and I don't believe I've done Kansas, and everything else I believe – perhaps those counties in New Mexico.

Q All right.

A I think that's how those state boundaries are. I've shipped them up to Kansas City.

Q Is there anything in particular about these geographics here that would restrict in any way the flow of the transport of heavy trucks?

A No, sir. This is just a management map.

Q No mountain ranges; no other difficulties in transporting trucks?

A Interstate roads. There's no mountains or oceans or –

MR. BYARS: Your Honor, we're about to go to a [192] different area. It's about 10 minutes till 12:00. Would you like for me to continue or should we – I'm going to go into some different comparisons at this time.

THE COURT: How long do you think it will take with those different comparisons?

MR. BYARS: The next comparison involves Tommy Davidson Trucking and that will take a little bit of time. We may be able to finish it in 10 minutes.

THE COURT: Why don't we do it and then once we finish with that, are you going into another area or –

MR. BYARS: We have a few, a few more comparisons, Your Honor.

THE COURT: Why don't we do another one, if we can?

MR. BYARS: All right.

Q Let me direct your attention to Exhibit 135.

A Yes, sir.

MR. BYARS: Your Honor, on this we're going be seeking to admit documents which have Plaintiff's Exhibits No. 135, 135-A, 136, 136-A, 137, 138, 138-A, 138-B, 138-C, we move for the admission of those Exhibits.

THE COURT: Any objections?

MR. WILLIAMS: Yes, Your Honor, I do have an objection, but perhaps we should approach the bench on those.

THE COURT: Ladies and gentlemen of the jury, I'm going to let you break for lunch. It's five till 12:00. We need to be

* * *

[196] MR. WILLIAMS: Right.

THE COURT: I'm going to admit all of those to include any sub parts or alphabetical listings. Those will be admitted over the objection of the Defendant. I will give you an exception and a continuing objection as those are reached. I don't know it will be necessary to renew your objection. I'm hoping we've taken care of it here.

MR. WILLIAMS: I hope so, too, Your Honor, so we can move things along.

THE COURT: But I am – I try to give advice where the Eighth Circuit is concerned, but sometimes it's not good advice, so . . . Anything further anyone wants to put on the record with the jury out of the room.

MR. BYARS: I can just – I can see that we're going to need to raise an issue outside the presence of the

jury soon and that pertains to – I'm a little bit confused and I want to be careful as we get into the issue of termination, where we are with regard to any offer by Volvo to Reeder-Simco for a new franchise agreement, the fact that there is no franchise agreement in place.

THE COURT: The only, the only rulings the Court has made had to do with a letter of termination, an alleged termination. I've not seen the letter. And I only do that because of a Motion in Limine. There was then two other parts to that Motion in Limine. There was an effort to keep that letter [197] out, as well as to keep out evidence of some sort of filing with the Arkansas Motor Vehicle Commission, and the third part of that, as I recall, had to do with a federal lawsuit that was filed in Little Rock, and I sustained the second, the second and third part of that motion and said I believe until I heard otherwise I was going to – the termination letter was I think relevant.

MR. BYARS: All right. And –

THE COURT: And having said that, I think the defense probably can say too that I thought, is the agreement not – is it not still in effect?

MR. WILLIAMS: Your Honor, the agreement is – well, I mean the way we see it, the agreement was in effect when the letter was sent, and we could argue about whether that was really a termination letter or not, but setting that aside, they filed the complaint.

THE COURT: Well, I think you've called it that in your Motion in Limine.

MR. WILLIAMS: Right, right. They filed a complaint and the complaint, as a matter of law under

Arkansas law, prevented any termination from going forward until the resolution of the complaint within the jurisdiction of the Motor Vehicle Commission. And then after that nothing happened and then in March of 2001 Plaintiff was in fact offered a new agreement, which the Plaintiff has refused to sign and return.

[198] THE COURT: Are you proposing to introduce evidence concerning a new franchise offer or –

MR. BYARS: Yes. We are. And I think I'm just having a hard time understanding why the jury can't understand the facts. I mean the fact was they sent this letter. The fact is that the Arkansas Motor Vehicle Commission sent a letter to Mr. Reeder saying we have received this official notice; you have a right to file a complaint. That's what we did. And that's how we are here. I mean those are facts that I don't think we can deny, and so when we get into these issues of – well, how was it that you're able to sell ABF, it's – as a matter of law we have been not terminated due to the fact that we have this pending complaint with the Arkansas Motor Vehicle Commission. The letter offering the new franchise agreement over a year – well, over a year later has not been signed because of issues, in that the agreement contains provisions which we believe are not legal in the State of Arkansas.

MR. SHANNON: It's the same agreement offered to every dealer in the United States, Your Honor.

THE COURT: Yeah. And I think that's probably, you know, relevant. I don't know really, Mr. Byars, what you're asking me to do or what I'm being asked to rule on. I can't give you advice on how to proceed in your lawsuit.

MR. BYARS: Well, I just – can we talk about the fact that – I mean without admitting the complaint into evidence, can [199] we talk about the fact that that's what happened?

THE COURT: You mean although you can't talk – if you want to know – if you can have testimony about the complaint, about the complaint itself, I think not. But I don't know – I'm not sure I know why you need that.

MR. BYARS: Well, otherwise it's a mystery on where we are. I mean it –

THE COURT: Well, they have sent a letter, you know, they have characterized it as a termination letter, and then I don't know that there's anything that precludes you from introducing this new agreement they are trying to get you to sign that you won't. I don't know what that does to your lawsuit.

MR. BYARS: Well, is it a problem to say that when asked why haven't you signed the franchise agreement to say, well, we believe it's not legal under Arkansas law?

THE COURT: I don't know that you can – I don't think that – that may not be a proper response. There may be, there are items in there which weren't in the old agreement on which we disagree. I think that's legitimate. I don't think you can –

MR. WILLIAMS: Your Honor, the fact is that they have been and continue to be an authorized Volvo dealer through this whole time period and anything beyond that really I think is trying to try and drag into this court a matter that's not before this court; that is, were they terminated and does that termination violate

the Arkansas Motor Vehicle Commission Act? [200] They haven't raised it. They haven't pled it.

THE COURT: Well, they may not have, but you know, you characterise it as a letter of termination, so I assume that's some evidence that –

MR. WILLIAMS: I think it was a letter of proposed termination. I don't know how we said it, but I'll go back and look at it, but I mean it's clearly capable of more than one characterization, Your Honor.

MR. CHRISTIAN: Judge, I've been real quiet throughout all of this.

THE COURT: I know and I've been surprised at that, too, Mr. Christian.

MR. CHRISTIAN: Well, may I just add this one thing?

THE COURT: Yeah, you may. Yeah, we would like to hear from you.

MR. CHRISTIAN: We feel like that in order to explain why we've continued on as a Volvo dealer, we should be entitled to show that we objected to the Motor Vehicle Commission so that that stopped the termination. Now, we feel like that's very relevant to why we continue on as a dealer or in the capacity as a dealer.

THE COURT: I thought I heard some argument from somebody and it may have been from the defense that once you filed this lawsuit, that somehow or other the dealership continued somehow. Did I not hear that?

[201] MR. SHANNON: You didn't hear it from us.

MR. WILLIAMS: Didn't hear it from us, I don't believe.

MR. BYARS: Not from us.

MR. WILLIAMS: I mean I think it's just speculation to say but for the fact that the Motor Vehicle Commission didn't have a hearing, that they would no longer be a dealer, and that's what the Plaintiffs are trying to say.

THE COURT: What happened to the lawsuit?

MR. WILLIAMS: Judge Howard abstained. We filed a claim saying that it was a violation of various constitutional provisions because of the way the Act is structured and the Commission is structured, and Judge Howard decided to abstain and said it was a state law issue, ought to give the state courts first shot at it.

MR. BYARS: And that was dismissed in October of this year.

MR. SHANNON: But the Motor Vehicle Commission has not heard any –

MR. BYARS: The Motor Vehicle Commission has not yet acted on the complaint. So the entire time that this cause was pending in the Eastern District, we could not get a hearing before the Arkansas Motor Vehicle Commission, so as a matter of law –

THE COURT: What's wrong with saying that a complaint was filed, not introducing the complaint, just saying a complaint [202] was filed?

MR. SHANNON: Your Honor, it brings in lots of issues. I mean just saying a complaint was filed, the jury is allowed to presume – I apologize –

THE COURT: No.

MR. SHANNON: – presume that they got – you know, they filed a complaint and stopped it. You know, and that's not what happened.

THE COURT: Well, what about a complaint was filed and it hasn't been heard? It's in Never-never Land or whatever? I mean it's a difficult issue for you. It's an equally if not more difficult issue for the Plaintiffs here. I'm trying to figure out some way to – but why not – why couldn't he say that a complaint was filed which had the effect of simply, you know, placing the suspension issue in suspense?

MR. CHRISTIAN: That's what happened.

MR. SHANNON: Well, I think it gives the impression that, you know, that Volvo was going to terminate them other than, other than if the complaint was filed. And I don't think that has, been established.

MR. CHRISTIAN: Judge, when you see the letter, the word "terminate" and the termination date is clearly set forth. Now –

MR. SHANNON: It says if your performance –

MR. CHRISTIAN: That's where the impression that Volvo [203] was going to terminate came from.

MR. SHANNON: If your performance does not improve, then you will be terminated.

MR. WILLIAMS: For the entire year.

THE COURT: Well, let me think about it, but I'm inclined, I don't know how else out of it. I think if we

don't do this, we may really have the jury confused. And I am inclined to say that a complaint was filed. It has not – I don't want to mention the federal court lawsuit.

MR. WILLIAMS: Right.

THE COURT: The complaint was filed with the Arkansas Motor Vehicle Commission. It has not been heard and everything is just in limbo. What's wrong with that?

MR. WILLIAMS: Well, I think –

MR. BYARS: Well, I think that we could just – would indicate that as a matter of law any attempt to terminate is ineffective.

MR. WILLIAMS: See, now he's really – he's lapping over into the commissioners –

THE COURT: I think so, too, and I may not permit that, but –

MR. WILLIAMS: I mean, Your Honor, again, the underlying principle for us is this jury should not be prejudiced by allegations of termination that have not been raised and cannot be raised before this Court, and I'm not saying he's doing [204] that with that intent, but I certainly think it will have that effect.

THE COURT: Well, I think that, you know, if the letter gets in, I'm admitting the letter. I think that goes to good faith and the Franchise Practices Act and whatever. Then I think a subsequent question is going to be, you know, where do we go from here with reference to the termination? And I think a suggestion, or we may say that matter remains, remains pending, has not been

resolved, that there's no hearing on it. I want us to be careful how we do it, Joe, Mr. Byars.

MR. WILLIAMS: Are we going for Limiting Instruction D Your Honor?

THE COURT: I've had about all the limiting instructions – listen. My writing has gotten so bad that I even think Bettye had trouble reading Number C.

MR. BYARS: Well, we will just deal with it as it comes.

THE COURT: Well, no – I appreciate a heads-up, but, you know, I'm telling you I think that's how I want it handled, though. Is there any question about how we are going to handle it?

MR. WILLIAMS: Can we agree –

THE COURT: I'm not saying that anybody can't agree to it or whatever, but the Plaintiff cannot have it both ways, nor can the defense for that matter. We need to – I don't want [205] to – but I think you can say and I don't want it admitted that there was a complaint filed and the issue then with the franchise is that termination issue has just –

MR. SHANNON: But what I would consider what you've ruled here is that any attempt to say something to the effect of that we filed it and stopped the termination is too far.

THE COURT: Who is – they are going to say –

MR. SHANNON: That's what I think they are going to say.

THE COURT: No, no. Just say it hasn't stopped it. It simply hasn't been heard. Are we straight on that, Mr. Byars?

MR. BYARS: I believe so.

THE COURT: Well, I need a little more than I believe so.

MR. BYARS: Well, this witness, Mr. Heck –

MR. HECK: Excuse me?

THE COURT: Well, why don't you talk to Mister – you know, you talk with Mr. Heck, and why don't we assemble maybe at five till 1:00 after we've had a chance to reflect on it during the short lunch hour, but I think that's probably the best way to handle this, and it apparently doesn't please anybody, but I think it probably keeps the jury from just getting hopelessly bogged down or whatever. I'll see you-all at five till 1:00.

MR. WILLIAMS: All right. Thank you, Your Honor.

(Off the record at this time.)

[206] THE COURT: You-all want to put anything else on the record? When we broke for lunch, we were talking about how to handle the cancellation or the proposed cancellation of the franchise and how much to get into the hearing in front of the revenue commission or the whatever deal. Any further thoughts, Mr. Byars? Motor Vehicle Commission. I thought all they did was issue inspection stickers and whatever.

MR. BYARS: Well, we – one thing that I believe is going to come up also is the letter that was received

from Volvo is one. Then there is the letter that was issued by the Motor Vehicle Commission to Reeder-Simco is another Exhibit that does not pertain to the complaint. I mean there's no – there was another issue – a letter – after the Motor Vehicle Commission received Volvo's letter, the Motor Vehicle Commission sends a letter to Reeder-Simco.

MR. WILLIAMS: It's hearsay, Your Honor. I mean . . .

THE COURT: Well, I don't know about hearsay. It's just, you know, I think the issue – we have an issue – we have a federal statute we are concerned about. Then we are concerned about the Arkansas Franchise Practices Act or whatever. Let's talk about good faith or maybe lack of bad faith or whatever, but this lawsuit I don't think is about the cancellation of a – we're talking about the termination of a dealership. Good faith may be an issue. I think the letter as sent by Volvo, therefore, to Reeder-Simco is probably relevant and admissible and whatever, [207] but I think if we go much more than that, as we discussed before lunch, that there was a – there was a hearing request and it's just not been heard. It's just sort of in limbo. And that's where it is. I think if we go much farther than that, I think, you know, that all sides are on dangerous ice or thin ice.

MR. WILLIAMS: Judge – I hear what you're saying. I just want to make sure. Is this something you're instructing the parties that we're to observe or do you intend to give a mention to the jury of this or how do you –

THE COURT: Well, I'm hopeful that that's the way that we're going to go and that's how I am instructing us to proceed and what to avoid and whatever. I just think we're – What I don't want to do is spend two days here, as

much trouble as we spent in preparation and have a mistrial.

MR. WILLIAMS: Well, that's –

THE COURT: I think we are dangerously – I think we are getting pretty far afield, and I know we've got the 500 trucks to ABF as an issue and I know that's going to come up, so obviously the franchise must not have been cancelled, but by the same token, I think that's probably all they have done from and since then is probably those 500 trucks. So that's where I'm hoping it goes and that's where I'm instructing you to go and maybe we can get through the minefield without a very large explosion. How much longer you think you're going to be with him, Mr. Byars, in view of the fact that I think most of the

* * *

[212] that truck resulting to our dealer price. It makes the damage too high.

Q Okay. Just to look back on what the percentage was to the other Volvo dealer, that was 18.4 percent?

A Close enough, 04.

Q 18.04 percent. And then with regard to –

MR. CHRISTIAN: It's not showing up on –

MS. PORTER: I'm sorry.

Q I'm sorry.

MS. PORTER: Let me . . . Sorry.

Q The other dealer, 18.04 percent. Your sale, 13.27 percent?

A That's correct.

Q Is that right?

A Yes.

Q Now, had you received the concession actually granted to the other dealer, what would have been your resulting price?

A It would have been lower than the amount of $3,058 per truck.

Q $3,058 per truck?

A Right.

Q Multiplied by the three trucks is what?

A 9,176, $9,176.

Q And that's on the comparison on Ludington, is that correct?

A Yes, sir.

Q You had a – you were looking to make a sale to Tommy [213] Davidson, Inc, is that right?

A Yes.

Q And when was that?

A It was in July of 1997. Can you refer me to that Exhibit Number, please?

Q That's 135. How did you make this contact with this customer?

A Our company had been contacting him for several years. This particular contact resulted in a call by our salesman, Vaughn Drum.

Q All right. And take us through the transactions. What did you do?

A We got together and figured out the truck specifications and made a request for concession as reflected in this document here.

Q So you requested a concession on what was it, five trucks?

A Yeah. This is a poor copy. Five VNL 64 T 610 models on July 3rd, 1997.

Q And you requested 20, is that 22 percent?

A That's correct.

Q And what happened next?

A We received 17 percent and –

Q Is that indicated here on Exhibit 135?

A Yes. It's on line 16. That's a 17 percent I believe. It's difficult to make it out.

Q And this – you stated the date here on the fax indicates – [214] well, that's pretty small.

A Yeah. That would support it. The July 3rd, 97.

Q You faxed a request on July 3rd of 97?

A Yes, at 5:00 o'clock.

Q Okay. And then when did you get approval at 17 percent?

A On July 7th.

Q Okay. And that's shown right here, is that correct?

A Yes, and also confirmed by the date on the very top.

Q Okay. Now, you see this notation here?

A Yes.

Q Was that on the initial fax when you first got back the approval for 17 percent?

A No, sir.

Q Well, explain what happened between the approval for 17 percent and the next figure you received.

A Well, the 17 percent, we had started to prepare our final quotation to the customer based on the 17 percent, and then we received notification of an increase to 18.1 percent, and it has the words "to equalize concession."

Q All right. And did you understand what that meant at the time?

A Yes. What that meant to me was that there was another dealer on the same transaction.

Q And so what happened next?

A Well, what was going on here was Volvo Trucks are – they [215] are a premium truck. And we are trained by Volvo to always try to obtain a premium price for this product. So when we commented that the 22 percent was what we really needed to be competitive on this deal with Freightliner and International or Kenworth – I can't make out that notation down there.

Q Those notations are here on this concession request. You made notes of the situation down here, is that right?

A Yeah, there they are. Okay. So we were basically told to quote the thing at 17 percent, but we hadn't done it yet, and we got this notification for 18.1 percent.

Q All right.

A So then we were also told, you know, to quote it at 17 percent was to, you know, a reminder to take the truck down there and show it to the customer and have them drive it and see the quality of it. We thought that was good advice. That was also our policy. So we prepared our quotation at the 18.1 percent concession level; in other words, what was derived from that concession. We took the truck, and Vaughn Drum, the salesman, and myself went to Tommy Davidson Trucking and presented the bid. I believe the man's name is Mr. Smith. We presented the bid based on the 18.1 and we had him drive the vehicle.

Q All right. And then what happened?

A Have to go to No. 136. Okay. 136 is the – the concession is now 18.9 percent. And what transpired –

[216] Q Was this after you had given the customer, Tommy Davidson, what you felt to be your firm price?

A Yes. We indicated to Mr. Davidson that this was the best price, and a fair price for a Volvo tractor of this quality.

Q And then what was it, about seven days later that you received the 18.9 percent?

A Yeah. That's what's reflected on this document. July 14th

Q Okay. So what happened next?

A As memory best serves me, I had a conversation with Mr. Truta about this, was the first thing that happened.

Q All right. What was said?

A I advised Mr. Truta that I thought this was an improper thing to do; that I had already quoted the truck based on the 18.1 percent that we had also had a conversation about, and I thought that before he raised the number again, that he should have called me and found out if I was in a position to accept that same price level. And if he had done that – I can't say – well, forget that. I just told him I didn't like what he did. And I said that I was going to requote it at the higher price level, but I would have to do it by myself.

Q Okay. And why was that?

A Vaughn Drum refused to do it.

MR. WILLIAMS: Objection, Your Honor.

THE COURT: Yeah. You can't tell what Mr. Drum did.

A Okay.

[217] Q Well, so you requoted the deal after you had already told the customer what the firm price was?

A Yes.

Q And so what happened?

A The customer was known to have bought Freightliner. J D Wilson is his name, the man's name.

Q Let me show you Exhibit 138. Does that reflect your discussions with Mr. Truta, Bill?

A Yes, it does.

Q And what is the, it says, this afternoon I received another concession confirmation for Tommy Davidson, Inc. The approved amount is now 18.9 percent. Can you please call me and explain what is going on? I have already priced the units to the customer using the 18.1 concession you bumped from 17 percent. The customer said we were looking good. We quoted this deal with very low profit to get some numbers on the board. Our conversation on this was that we had to sell the benefits of VN and the customer had to drive the truck. I drove the truck with the customer last Wednesday. He was very impressed with the VN and then Mr. Truta gives a response. Well, what happened on, what happened on the transaction? Were you able to make the sale?

A No. The sale was lost to Reeder-Simco as well as Volvo.

Q And why do you think that happened?

A Excuse me?

[218] Q Why?

MR. WILLIAMS: Objection, Your Honor. I think it calls for speculation on the part of the witness.

THE COURT: I'm going to let him speculate. You may answer. Your objection is overruled.

A I believe we ruined our credibility with the customer.

Q Let me show you Exhibit 135-A. What is this document? Is that a document that you received from Volvo in the discovery process?

A That's a response to some of our requests for information.

Q Okay. And this reflects –

A New quotes.

Q New quotes.

A Week ending July 10th, 97. I've got my strong glasses on.

Q Okay.

A It's up at the top, very top.

Q At 18.1 percent on the VNL 64 T 610's, and there were five on that transaction.

A That's a reflection of our transaction that we submitted.

Q Okay. All right. And this 136-A shows the concession that was granted to the other Volvo dealer.

A Joe, can you help me find that on my copy, so I can depend on that?

Q Can you see that one on the screen?

A That would be the other dealer's approval at 18.9 percent.

[219] Q All right.

A Yes, it would.

Q Let me show you what's been marked as Exhibit 138-A. This is an invoice from Volvo to the Volvo dealer known as the Volvo and GMC Trucks of Dallas. With respect to the sale of the 1998 VNL 64 T, is that what you were quoting on the Tommy Davidson transaction?

A Yes.

Q And you eventually received the 18.9, but it was too late, is that right?

MR. WILLIAMS: Objection, Your Honor. He's – that's leading.

THE COURT: Try not to lead.

Q You eventually received 18.9, didn't you, off Tommy Davidson?

A After the fact.

Q And then 138-B reflects that this other dealer on a five truck deal obtained 22.5 percent, is that correct?

A Exhibit 138-B reflects 22 and a half percent.

Q I'm sorry. Yes. 22.5 percent. And with that concession amount, this other dealer, Volvo and GMC Trucks of Dallas, was able to make a sale, wasn't it?

A Yes. These are only sales comparisons, these results. These are not strictly bids.

Q And in addition to that, take a look at 138-C.

[220] A Yes, sir.

Q Does that involve yet another Volvo dealer in this timeframe receiving a concession of 22.5 percent?

A Yes, sir, same model.

Q And 138-C, the next page. Does that reflect another Volvo dealer on another deal receiving 23.9 percent on the same model?

A It reflects –

Q In the same timeframe?

A 23.9 percent on VNL 64 T 610. It appears to be the same dealer as the previous Exhibit.

Q And the next page, that's another VNL 6410. Different Volvo dealer. This was February of 98, at 21.5 percent, is that correct?

A Right, one truck.

Q I'm sorry?

A Postmarked February of 97.

Q February of 97, is that correct?

A Yeah. We are in 1997. I'm sorry.

Q At 21.5 percent? Another VNL 64 T 610 to dealer 5547 D, another Volvo dealer, 21.7 percent?

A That's correct.

Q Another transaction this time to dealer 5383 D?

MR. WILLIAMS: Your Honor, may we approach the bench? We need to address something with the Court.

THE COURT: Yes

[221] MR. WILLIAMS: Thank you, Your Honor.

(The following proceedings were had at the Bench between Court and counsel and out of the hearing of the jury:)

THE COURT: What's up?

MR. WILLIAMS: Well, it appears to us, Your Honor, that we are getting some comparisons. We are being sandbag here a little bit. We asked for and tried to get all of these comparisons and now I don't think that we've – it's not in this affidavit. We've never seen these before. We obviously are prepared for trial to answer these comparisons, and now we're getting something that was not provided to us.

MR. BYARS: I disagree. I mean you've had these Exhibits. I mean –

MR. SHANNON: No, I don't.

MR. BYARS: These exhibits were provided to us by Volvo.

MR. WILLIAMS: As part of a 14,000 –

MR. SHANNON: For 16, 17,000 trucks.

MR. WILLIAMS: – trucks, Your Honor.

THE COURT: I thought we had agreed that these Exhibits could be admitted.

MR. WILLIAMS: My understanding was they were coming in based upon what was basically in his affidavit and that was – I'm trying to expedite matters, Your Honor.

MR. SHANNON: Your Honor, I mean if you want to look at [222] at his affidavit and see what he's –

THE COURT: I've seen it. I've got –

MR. SHANNON: He only uses one comparison to the Tommy Davidson deal and we've gone through about seven here, and, you know, I want to have an opportunity for our witness to go back and do research and try to figure out to rebut these deals.

MR. WILLIAMS: He's coming down here Greensboro. He's in a plane, if he's not already landed right now, Your Honor.

MR. BYARS: Just because I didn't put something in an affidavit in a response to a Motion for Summary Judgment doesn't mean I can't use it later. The document was produced by Volvo in discovery.

THE COURT: I'm inclined to agree with you. How many more do you have?

MR. BYARS: That it's on this one.

MR. SHANNON: Your Honor, we had discovery requests asking for him to show us what, you know, how you intend –

THE COURT: Let me say this. If there's an objection, I'm overruling your objection. In order to save us another trip, are we going to have this come up on any other – are you using any other exhibits that were not reflected in –

MR. BYARS: In his affidavit? Possibly. That's possible. I mean we've produced these Exhibits previously. These are documents that were produced to us by Volvo.

MR. WILLIAMS: Your Honor, we asked for damage. We [223] wanted to know what are your damages?

THE COURT: I know.

MR. WILLIAMS: And they said it was going to be – a witness who is not going to be here, and then we asked to supplement and we didn't get any supplementation. All we got was his affidavit and some summary charts they were going to get into. So we did not have notice that they were going to rely on these comparisons for damages, and to the degree the Court's going to let them in, we will have to ask for a continuance or a recess in order to be able to address these.

THE COURT: Well, I am going to overrule your objection. You'll have some time after he finishes and hopefully you can get your guy prepared, but I am concerned about how many more you've got.

MR. SHANNON: He can't get prepared here.

THE COURT: I want to hear from Mr. Byars.

MR. BYARS: There's nothing else on Tommy Davidson.

THE COURT: I know about Tommy Davidson.

MR. BYARS: Let me tell you. This one was a little longer non-sale comparison. The rest of them we're going to be looking at a Reeder-Simco guy versus another dealer.

THE COURT: Well, are they included within the deposition – the affidavit is what I'm trying to say probably.

MR. BYARS: I can't remember whether all of them are in the affidavit or not. I mean –

[224] MR. SHANNON: Your Honor, we relied on – I mean this was the only semblance of a discovery response we got.

THE COURT: Well, you know, you've got the numbers of Exhibits that have been introduced in this matter. My suggestion would be let's kind of see if I can give them a brief break and compare your Exhibits with what you believe to be the affidavit and let's address it and we'll go from there. Okay?

MR. WILLIAMS: Okay. Thank you, Your Honor.

(The following proceedings were had within the presence and hearing of the jury:)

THE COURT: There's some matters I need to take up with the Court – with the attorneys. I think you could either remain in place here or it may be more comfortable to go back and see if there are any doughnuts left. It's too early for a break, but I think you may be more comfortable and let us hear it here. We're not talking about you guys when we have these conferences. I want you to know that. I remember seeing I think, Mr. Carpenter, aren't you from Waldron?

A Yes.

THE COURT: You know, Dizzy Dean was from Lucas which is right outside of Waldron. And I remember when I was a kid, I saw a movie about Dizzy Dean and the pitcher who I think was Dan Duryea, was acting the role of Dizzy Dean, but he was always having a conference with the catcher, and everyone was always saying in the

audience or in the crowd wonder what are they [225] talking about? They were talking about where they were going to have dinner or something, but I want you to know that we're not talking about dinner or whatever, but these are things that should expedite the trial and whatever. We are going to remain in session until you're out of the room, but remember the prior admonition of the Court not to discuss this with anyone or allow anyone to discuss it with you. Thank you very much.

(The jury leaves the courtoom. The following proceedings were had outside of the hearing of the jury:)

THE COURT: Okay, boys. It's seven minutes till 2:00. We've had a pretty lengthy recess. We've discussed the Exhibits we have agreed to introduce. Any problems with the Exhibits? What's the problem on the remaining Exhibits?

MR. WILLIAMS: Your Honor, the problem – part – in terms of shear numbers what we've got is Exhibit 138 itself is what I thought we were introducing which is a copy of the e-mail from Mr. Heck to Mr. Truta and in return from Mr. Truta back, and then there's a 138-A, B and C which includes a total, I believe, of eight comparisons which Mr. Heck's already dealt with which we already know, and, from looking at it, there's no way from seeing this, these documents were not attached to and part of this e-mail.

MR. SHANNON: And also not discussed in this affidavit.

MR. WILLIAMS: Not discussed in the affidavit, so we had no prior notice that these comparisons were going to be made, [226] and then on the others, there's one

more, on the Beach Trucking matter where it appears there were four comparisons again, which there was no previous notice despite requests in discovery and for supplemental discovery, so we are not prepared on those. It appears to us on the rest of them that we are okay.

THE COURT: Have you provided – on any of the information – I know it came from them – on the Beach, those four Exhibits?

MR. BYARS: Well, we provided them with these Exhibits which we got –

MR. SHANNON: Friday.

MR. WILLIAMS: Got Friday.

MR. BYARS: – at the pre-trial conference. I'm not sure when I – we may have sent you those in advance of Friday.

MR. SHANNON: I can tell you that some of these were the affidavit, but A, B and C I do not believe were part of the affidavit.

THE COURT: I tell you what –

MR. BYARS: I don't believe there is a specific –

THE COURT: Joe, let me finish. I'm going to admit them over your objections. When your man comes and he's coming from –

MR. WILLIAMS: Greensboro.

THE COURT: – North Carolina or wherever, the Court will give serious consideration to letting you, I think you ask [227] him a question sort of as follows: Have you had a chance to view these, and if he says no, you can

follow up with do you believe that your analysis of those would be any different from the ones you did analyze? I don't want you to get blindsided, but by the same token I think they are exhibits, and perhaps there's something that your guy in the short period of time can get prepped on.

MR. SHANNON: He's done all his work in Greensboro where he has –

THE COURT: Well, I understand, but we've got phones here. You're far from the civilizing influence and from Little Rock and whatever, but you can call and probably have stuff faxed here and whatever, but I'm going to admit them, but I'll give you substantial latitude in using direct examination on him concerning those exhibits.

MR. BYARS: Thank you, Your Honor.

THE COURT: I understand your position. Get them back in, please.

(The following proceedings were had within the presence and hearing of the jury:)

THE COURT: That took a little longer than we thought, but I think we were well-advised that you go back there, but go ahead and continue, sir.

MR. BYARS: Thank you, Your Honor.

BY MR. BYARS:

[228] Q Mr. Heck, you were working on a sale to Beach Trucking in January 29th or January of 1998, is that right?

A Yes, sir.

Q How was it that you made contact with this potential customer?

A I contacted them in Little Rock as a result of knowledge that they operated trucks.

Q And what model truck were they seeking to purchase or had at interest in?

A VNL 64T 610.

Q And how many?

A 170.

Q Did you request a concession of 26.7 or 26 percent?

A Yes.

Q And what concession amount was approved?

A 23.8 percent.

Q Was the 23.8 percent enough to get the deal?

A No.

Q Did you submit a quote to Beach Trucking based on the pricing at 23.8 percent?

A Yes.

Q Let me show you what's been marked and admitted as Plaintiff's Exhibit 239. Is this an invoice to another Volvo dealer known as Great Southern Volvo Transportation in Jackson, Mississippi?

[229] A Is this Exhibit 140?

Q 239. I'm sorry.

A Yes. That's Great Southern, Jackson, Mississippi.

Q And this was – this involved a sale by Volvo to that dealer for a 1999 VNL 64T, is that correct?

A Yes.

Q That was for a customer of Total Transportation, is that right?

A Right.

Q About how many trucks was this dealer bidding on?

A Can you read me the first and last serial number?

Q Yes. It's 566590, 566836.

A That would be approximately 247, unless I misunderstood your numbers.

Q Well, I think that's a greater number than appears on this list.

A What Exhibit is it, please?

Q It's Exhibit 239, 239-A. I'm sorry. And I believe there are 33 trucks that appear on one page. This is about a page and a half.

A I see. There are breaks in the serial number sequence.

THE COURT: Mr. Byars, if you know, I'd permit a question I think that would suggest the answer to him.

BY MR. BYARS:

Q Well, let me ask it this way: Are there, are there 60 or [230] less?

A Exactly 60 from my rapid hand count. I would accept 55 or 65.

Q Okay. And you were looking at a bid of 170?

A Yes.

Q What was the concession amount approved for this Volvo dealer?

A 26.1, 26.1.

Q 26.1 percent? That obviously resulted in a sale for that dealer, is that right?

A Yes. These are sales.

Q Let me show you another invoice that's marked as Plaintiff's Exhibit No. 241, and is that an invoice from Volvo to Doonan Truck and Equipment of Wichita, Kansas, with reference to a sale to Vulcan Materials?

A Yes, it is.

Q And that's also for a 1999 VNL 64 T?

A That's correct.

Q Would you look at Plaintiff's Exhibit No. 241-A. What does this Exhibit indicate as far as the number of trucks involved in that transaction?

A I believe ten.

Q Okay. Now, with regard to Vulcan Materials, it was a – there was a price change in 1998, wasn't there?

A Yes, between say January and March. We discussed that [231] previously.

Q Okay. Well –

A It would be hard to make that comparison. We could do it, Joe, but it would take a long time.

Q In the interests of time, why don't we not get into that one at this time?

A That's all right with me.

Q Let me have you look at Exhibit No. 148. (Pause)

A Okay.

Q Was Reeder-Simco seeking to sell trucks to REC Transport?

A That's correct.

Q And how did you make contact with this customer?

A One of our salesmen had made contact.

Q And this was in May of 1998?

A Correct.

Q And what was the number of trucks sought on this transaction?

A Five.

Q All right. There was a concession request of 21 percent?

A Yes.

Q And what was the amount of the concession approved?

A Two. Joe, could I say something else about that number?

Q Sure.

A This is probably an example of the confusion on this salesman's part. It probably would have been more reasonable to [232] ask for 10 or 12 percent, but he did not fully understand this change in the pricing structure between the two periods. So that would explain his 21 percent request, I would believe.

Q Okay. But what was granted on this four to five truck transaction was 2 percent?

A Yes.

Q And that was for model VNL 64 T 420 or VNM 64 T, is that correct?

A That's correct.

Q Let me show you what's been marked and admitted as Exhibit 149. This is an invoice from Volvo to the Westfall Volvo GMC Trucks dealership in Kansas City reflecting a sale for Lezzer Lumber?

A Yes, sir.

Q And what's the postmark date with regard to this transaction?

A May 20th, 1998.

Q Okay. And the date of your concession request on REC Transport was May 5th of 98?

A That's correct.

Q All right. And this also involves the VNM, 1999 model VNM 64 T, is that correct?

A Yes. And the same base model on that price.

Q Okay. Same base model and that price of 55,662?

A That's correct.

[233] Q What was the concession amount granted to this other Volvo dealer?

A 10.6 percent.

Q All right. And that's also reflected on this Exhibit 149-A, is that right?

A Yeah.

Q And that shows that this was a three-truck transaction –

A Right.

Q – where this other Volvo dealer got a greater concession, is that correct?

A That's correct. That's correct.

Q Also, on the same comparison let's take a look at Plaintiff's Exhibit No. 150. Is this an invoice to another Volvo dealer, General Truck Sales and Service, reflecting a transaction involving a 1999 VNM 64 T?

A Yes, with the same base price.

Q All right. Same base price as shown here on this Exhibit? And postmark date on this transaction is April 8, 1998?

A That's correct.

Q And yours was May 5th of 98.

A Yes.

Q So the same base model price. There's no price increase that affects this transaction, is that correct?

A They are the same price increase, same data book price would apply.

[234] Q Okay. And this dealer with respect to the Cargo Logistics received eight percent on one of the trucks and 11.3 percent on the other, is that correct?

A That is what it shows; yes.

Q The same transaction, this is another – this is an invoice from Volvo – this is Exhibit, Plaintiff's Exhibit 151. Is this a copy of an invoice from Volvo to another Volvo dealer, Chief Truck and Equipment Center, in Doonan, Oklahoma?

A Yes, Duncan.

Q Duncan, Oklahoma. I'm sorry.

A Yes, sir.

Q And is this also for the 1999 VNL? That's a VNL 64 T.

A This would not be a proper –

Q That's a different model, is that correct?

A That is correct. Would that perhaps be the other model we quoted? No.

Q No. That's my fault.

A That's all right.

Q Let's not look at – we'll withdraw that one.

THE COURT: Which one are you withdrawing?

MR. BYARS: 151 and 150 – I'm sorry. It's – yes, it's 151 and 151-A, Your Honor.

A That is a comparison to that other truck though. Yeah, you can leave it out if you want to, you know, the point's made.

Q Let's take a look at Exhibits 153 and 154.

[235] A Yeah.

Q We've heard about Trans States Lines. Had Reeder-Simco prior to May of 1998 previously sold trucks to TSL, Trans States Lines?

A We have sold quite a few trucks to Trans States Lines.

Q And were you making a bid to Trans States Lines in May of 1998?

A Yes, sir.

Q And Plaintiff's Exhibit 153 is what?

A That's our request for additional concession beyond the normal dealer price discount.

Q All right. And you requested on this transaction – well, what were you – just tell me about the transaction. What were you bidding, and what was your request?

A Let me do this a little bit differently. There's 146 and 125. So that would be 273 total. And the reason why

they're split into two columns is the first column, if you see those tiny little numbers on line 12. We wanted 48 of them the fourth quarter of 1998; 98 of them the first and second quarter of 99. And we forecasted that they would be 1999 models. And then based upon the customer's request for delivery. The 125 is broken out as 100 the third and fourth quarter of 99, plus 25 for the first quarter of 00. So we felt it was necessary to portray this in this fashion to the factory so they could make the proper decisions. And then as is normally the case, we showed them what [236] price level we were using. You know, we were using April data. And the concession request I felt 13 percent was required to be competitive on this deal due to my conversations with the customer. And then the rest of that is information that came back from the factory. You want to go through that down there?

Q Well, let's cover it. What information on this transaction did you actually provide to the factory?

A I wanted them to be aware that there was no financing obligation for Volvo to consider. There were no trades to consider and that they had to be spread out in such a way that we would not receive more than five per week. In other words, it was going to be a tightly-controlled schedule. And I advised the factory that they had recently purchased 15 Freightliners and 15 Navistars. And I gave them the information about the fleet size and how many were Volvos and when we expected them to accept bids and the fact that Freightliner and Navistar was the competition; That it was all class eight account. That's what that 100 percent means. There's no, you know, smaller trucks counted in that number. And then the normal stuff, funding source, customer, in AOR, yes, to indicate to them that it was in my area.

Q What is this information here that appears on the concession request?

A That's a notation that came at the same time as the nine and a half percent approval on the first column and the seven perçent [237] approval on the second column. And that was a two percent scribbled out with two and a half scribbled up above. And I'm having a hard time reading that one. I think it says escalator, but, you know, your guess is better than mine, based on a dealer net for model year 2000, units to be built by 12/31/99. Any changes, blah, blah, blah, are going to be paid for by the customer, escalators to be calculated on dealer net. So that's a way of advising us that the 2000 models as compared to the 1999 models should have a two and a half percent price escalator. But I, on the face of that I was very confused, because I thought the two and a half percent was already reflected in the reduction and concession. In other words, the nine versus the two and a half, nine and a half versus two and a half is seven. I'm getting scrambled. I'm sorry. But like I say, I was a little – I believe I called to get it straightened out.

Q Okay. This quotation of TSL showed up on, of course, Volvo's records in its record called a new retail quote as of May 28th of 98, is that right?

A Do you see it there? There it is. Oh, is that May 28th? Is that what you're asking?

Q Yes.

A Yeah, that's what that says. So it's down there at the same time.

Q Down here also on Volvo's records there's Trans States Lines and one of them shows 9.5 percent and one shows 7 percent.

[238] A Yeah. It's the 146 and the 125. That's our deal.

Q Okay. Now – and yours was May of 98, your request?

A That's right.

Q May 26, 98.

A Right.

Q Take a look at what's been admitted as Plaintiff's Exhibit 154. What is this?

A You asked –

MR. WILLIAMS: Your Honor, just a moment. We object to any testimony about this document. We have, you know, it's admissible, and, but this individual, this witness has no personal knowledge and there's no foundation for it.

THE COURT: Where did this document come from?

MR. BYARS: This was produced to us by Volvo –

THE COURT: In discovery?

MR. BYARS: – in discovery. VTNA 1324 is the discovery number.

THE COURT: Have you seen other documents like that from Volvo?

A Other ones like that?

THE COURT: Yeah, like that one?

A I've seen several.

THE COURT: I'm going to let him testify. I think he can testify to his interpretation because of what he is and what he's done and Volvo records he's reviewed of what he thinks it [239] means. You can cross examine him. You're overruled, and you may answer.

A I forgot the question. I'm sorry.

Q Well –

THE COURT: I think I did, too, but let him ask it.

Q This says – the document 154 says special price confirmation, doesn't it, at the top?

A This, this – if we are talking about what is this form?

Q Yes.

A This is a special price confirmation of a slightly different format as the one we had been accustomed to using. I've seen perhaps three different variety – varieties of these in my time as a Volvo dealer that we have used. We standardized on the one that we used. The factory or Volvo appeared to have no problem with it. We thought it gave us enough room to tell the story we wanted to tell and reminded to us include the information at the bottom that was required, and to some extent my sales people were familiar with the use of this form, so we used this form. This other form would be the same type form that results in concession being granted for whatever deal they turn in. So as far as that goes, that's the difference, format.

Q So this is a request that was submitted to Volvo by another dealer –

A Yes.

Q – on TSL –

[240] A That's correct.

Q – from Charlotte, North Carolina?

A That's what it says.

Q And that was for VNL 64 T –

A Right.

Q – 610's –

A Yes.

Q – and with a concession request of 14.5 percent –

A That's right.

Q – and a concession approved at 11.7 percent.

A Right, and a similar notation.

Q Yeah. Let's look at the notation here and compare that to what appeared on yours. If you'll just read that.

A It says two percent escalator based on dealer net for model year 2000 units to be built by 12/31/99. Any specifications or product improvement will be added to dealer net, so that part's all the same, but the two percent is different, and it doesn't appear to me –

Q On yours it said 2.5 percent.

A Yeah, the two percent was taken out and two and a half was added. And the –

Q Tell us what the escalator meant. That means it would go up by 2.5 percent?

A Yes. When they were – it says based on dealer net for model year 2000, so, so if the dealer net was $50,000, if it was [241] going to be built as a 2,000 model, what they're saying is that it's going to be 50,000 or $51,000. That would be two percent I guess, isn't it?

Q All right.

A I'm getting puzzled here over the numbers.

Q Well –

A It's $1,000. It would be $51,000 as a 2000. And they're reserving the right, if there is Government-mandated equipment or anything else that that has to be paid for. So I bid it to the customer. I say if there is a requirement for 2,000 that's not in here, we're going to have to go up on the price for the value of that special equipment.

Q Okay.

A That part is the same, not the percentage.

Q What competitive information or this other information that you included on your request does not appear on Exhibit 154?

A There's no information as to what the competition is. That would be down towards the bottom. Are you able to see that below Suzanne Warren's? There's no indication of the fleet size. There's no indication of how the trucks are

to be paid for. The pricing, you know, the 56,238 is the same. The 16 –

Q You're looking at this right here –

A Yes, I wrote on it.

Q – compared with what yours was?

A Yeah. Ours was 56,238; theirs was 56,238.

[242] Q All right.

A But then the optional content, their options are 16,461. I'll just try that. And our options were 16,555. So there appears to be a ninety-dollar difference in the interpretation of what the customer's specification was, but it is the same deal.

Q Bottom line is this Volvo dealer out in Charlotte got 11.7 percent and you received 9.5 and seven percent?

A That's right.

Q Who owns that dealership out in Charlotte?

A Terry Young.

Q Who is Terry Young?

A He's a dealer principal. He had been a Volvo factory employee, much the same as I was a GM employee, but he was the president.

Q Let's take a look now at Plaintiff's Exhibit 155 and 167. I'm sorry. Let's first begin with Exhibit 155, and what is this, Bill?

A That's our concession request for a potential sale to Land 'O Frost, a customer in Searcy, Arkansas.

Q And, what were the quantity of trucks you were seeking to bid to sell to this customer?

A Now, this is an alternate. This is five VNL 64 T 660's or as an alternate five VNL 64 T 610's. This customer is extremely weight conscious. They haul lunchmeat in a refrigerated trailer. Weight becomes a very important issue and these two trucks have a [243] slightly different weight.

Q And your concession request was what?

A Six percent.

Q And what was approved?

A Two percent. There's some notes in the comments that would support the competitive situation.

Q You gave some additional information about this quote to Volvo?

A Yes.

Q Now, let's take a look at Exhibit 156.

A Yes.

Q Is this a copy of an invoice from Volvo to Southwest Missouri Truck Center in Springfield, Missouri?

A Yes.

Q And we are dealing with – this was an invoice reflecting a sale of 1999 model VNL 64 T's, is that right?

A Yes. And this is a point in time when again the 610 was not reflected as part of that model number. It's back on a later page. These are 610, so it would be the second comparison.

Q Now, take a look at Exhibit 156-A. The invoice shows that to this dealer they were going to resell to B & D Produce, correct?

A The truck was ordered on behalf of B & D Produce.

Q Sold by Volvo to the dealer, of course?

A Sold to Southwest Missouri Truck Center who indicated that B [244] & D Produce was their intended customer.

Q And there were – well, this Exhibit 156-A is a copy of a printout we received from Volvo indicating the number of trucks in this deal?

A Yeah.

Q And there appear to be six?

A Six.

Q And what was the concession granted to this dealer on that transaction?

A 4.9 percent.

Q And what is the date that that dealer ordered the trucks?

A March 20th, 1998.

Q All right. Let's move ahead to –

A Joe, that's a difficult comparison as well for the jury to understand. There's a different price level on those.

Q On the Land 'O Frost?

A Yes. Postmark date of March 1998 created a higher dealer net.

Q Right.

A Or lower, actually. The trucks are a thousand dollars difference in price to start out with. So we would have to do a lot of calculations to level it out, and I don't care to.

Q Now, we've got a number of other comparisons on this transaction. Can you locate one where?

A I'm sorry, Joe.

[245] Q Where I'm not messed up on it?

A All right.

THE COURT: Land O' Frost, is that a refrigerator-type unit or something?

A Yeah. Yeah, baloney and salami and that's what they make.

THE COURT: Cold cuts?

A You bet. 1,700,000 pounds a week.

Q That's my fault.

A That's the way it goes. Could we refer to 155-A, Joe?

Q These are, 155-A are additional documents produced by Volvo in discovery. And there are a number of pages, if you'll refer me to a page number . . .

A You could look at 9131 and ask me what questions you want. I mean, you know the VTNA number?

Q All right. From this document are you able to make a comparison for the Land 'O Frost transaction?

A All I can do is look through there for 610's and the quantity of five and see one for four percent, and, and one where the ring binder hole is, two percent as ours is, and so on.

Q Okay. There's one VNL 64 T 610, five units, four percent?

A Right.

Q And there are – comparing the same number of units and there's one of the two units at 13.1 percent. We've got another – is that yours? Rigg Transportation, 5.2 percent.

A See, Joe, the difficulty is the page 9129.

[246] Q Right.

A That's where our deal would be reflected –

Q Okay.

A – I think. Let's go on.

Q Next let's look at Exhibit 168. (Off the record briefly.) What is Exhibit 168, Bill?

A That's a letter from Jerry McNair to Bill Heck dated August 26, 1998.

Q And what does that have to do with?

A That has to do with a potential sale of highway tractors to ABF Freight System.

Q All right. And how many tractors were contemplated being sold in this deal?

A I believe it was five to 600. I have some records I could reference.

Q All right. And what amount of discount were you authorized for on this deal?

A 13.9 percent. It's the second bullet underneath my name.

Q Okay.

A You have a highlighter. Sure.

Q R S A?

A Yeah. The other name, Retail Sales Allowance, Concession, Same thing.

Q This was August 26th of 1998?

A That's right.

[247] Q Now, let me refer you to Plaintiff's Exhibit 169, and this says order board as of August 13 of 98. You know what the order board is?

A Yes.

Q What does that mean?

A That's the trucks that had been ordered that have not been produced and there's a footnote that leaves out trucks that have zero concessions before February 1st, and it leaves out credit; in other words, trucks they can't build because there's no financing arranged by the dealer, and to be cancelled. In other words, before you cancel a truck, you have to get it out of the schedule so it's what they're going to build.

Q And your bid on these ABF trucks in 98 was for the VNM 42 T model?

A As I recall. I believe that's right. I don't have that document in front of me to tell you for sure, though.

Q All right. Hang on. (Pause) Let's go on. We will try to locate that document here. Let me show you this Plaintiff's Exhibit 169, if I could make this to where everybody could see that, there were – on the order board as of August 13, 1998, VNM 42 T, 462 trucks at a concession level of 16.2 percent. Is that correct? Is that what that document shows?

A Yes. And that document would indicate a cumulative value, not a – that's not a single order for 462 trucks at 16.2 concession. That's an order board that –

[248] Q That would be the average concession for that many trucks?

A That should be.

Q All right. As compared to what you were granted on this proposed deal to ABF of 13.9 percent?

A That's correct.

Q Let's take a look at Plaintiff's Exhibit 171?

A Joe?

Q Yes?

A I have a deposition document.

THE COURT: Listen. You may just want to respond to the question, though, that he asks. If you just

start making statements or if you start asking questions, I'm going to have to swear in Mr. Byars maybe.

A I'm sorry. I apologize.

THE COURT: That's okay. No, just – But when he asks a question, answer it and if you need to take a break or if you need to consult with him, well, you can do that.

A I would request that.

THE COURT: Mr. Byars, I think your client wants to talk with you. Why don't you just stand down, go down? You can visit with him out there, and if it takes longer than just a minute or two, tell us and we'll all take a break.

(Off the record at this time.)

THE COURT: We ready to go back on the record?

MR. BYARS: Yes, Your Honor. We have located [249] Plaintiff's Exhibit No. 229.

THE COURT: Okay, sir.

MR. BYARS: We would move for the admission of that document.

MR. WILLIAMS: Just a moment, Your Honor, if I might. All right, Your Honor. No objection to 229.

THE COURT: Admitted without objection as 229?

MR. WILLIAMS: 229, yes, Your Honor.

BY MR. BYARS:

Q Bill, I had earlier showed you Exhibit 168, and that was your – that was a letter showing you what your concession approval was of 13.9 percent.

A Yes.

Q And what is Exhibit 229?

A That is my actual bid.

Q That's the letter where you sent your bid to ABF?

A That's correct.

Q And that reflects that you were bidding on the VNM 42 T?

A That's correct. That confirms that. And it shows the volume 500.

Q 500 units?

A That's right.

Q Reflecting the price in light of your concession approval?

A Yes.

Q Were you able to get that deal?

[250] A No.

Q Let me show you what's been marked as Plaintiff's Exhibit 171. What is this document?

A That's a concession request dated December 21st, 1998, for a potential sale to Carco Carrier Corporation in Ft. Smith Arkansas.

Q All right. And does this represent some attempt at some new business for you?

A Yes.

Q Who was the salesman on that deal?

A Ken Plemmons.

Q And was Ken Plemmons one of your salesmen that you hired in 98?

A Yes, he was; yes.

Q Okay. And this was for 60 units, is that right?

A That's right.

Q Model No. VNL 64 660?

A There's an error. It should be VNL 64 T 660, but it shows a VNL 64, which doesn't exist.

Q Okay. And the amount requested was 12 percent?

A That's correct.

Q And you received 10 percent?

A That's correct.

Q All right. Information provided to Volvo about this deal?

A Yes.

[251] Q This would have been a Conquest account?

A Yes. Never have sold them a truck.

Q And the funding source is listed as Bank of the Ozarks, is that right?

A Yes.

Q So there's no funding or financing burden on Volvo?

A Or Reeder-Simco.

Q Or Reeder-Simco? And the competition or the primary – had a fleet size of 650, is that right?

A Yes.

Q And so they previously had been sold the Navistar line of trucks?

A At that time.

Q All right. Now, if I could have you look at Exhibit 172 . . .

A Yeah.

Q Is this a copy of a Volvo invoice on a sale to the Volvo dealer known as Great Southern Volvo of Jackson, Mississippi –

A Yes, it is.

Q – for the model 2000 VNL 64 T 660's?

A Yes.

Q And what concession amount was received by this dealer?

A Eleven and a half percent.

Q And this transaction involved how many trucks? I'm showing you Plaintiff's Exhibit 172-A.

A 15, 15.

[252] Q All right. Now, you were bidding on 60 trucks in December of 98 on that Carco Carrier transaction?

A That's right.

Q And I want to show you a document produced by Volvo in discovery. It says new retail order detail as of January 7 of 99. And there it is. Does this document reflect that there were – there was a sale, an order of 60 trucks VNL 64 T for S A I A Motor Freightline at 18 percent.

A Yes. Joe, that is a different model number.

Q I'm sorry. We are looking at VNL 64 T 660?

A Yeah. What – where are we?

Q We're on Plaintiff's Exhibit 173.

A It would be higher up on that chart. You can find the 660's.

Q Yeah, on the first page here we located that. We've talked about the Fastway Systems, 11.5 percent.

A That's correct. That's what that reflects.

Q And the Land/Air Transport, 114 percent? (sic)

A Yes.

Q MGM Transport, ten units at 11 percent.

A Sure.

Q UPS Truck Leasing, 25 units at 13.1 percent.

A Yes.

Q And now right here we're looking at – see the notation which says one next to these transactions?

[253] A Yes, I see that.

Q What does that indicate to you?

A Well, this is a retail quote list. At the same time they put it on the retail quote list they got the order.

Q So those transactions resulted in sales?

A Yes.

Q Is that your understanding?

A Yes.

Q Let's take a look at Plaintiff's Exhibit 174. What is this document?

A This is our special price confirmation request dated February 19th, 1999.

Q And who was the customer on this deal?

A In God We Trust Trucking, I G W T.

Q How was that contact made?

A Ken Plemmons was out looking for new business.

Q All right. And the quote was for ten units of VNL 64 T 610's?

A Yes.

Q The request was 10 percent, is that right?

A That's correct.

Q Approval at 5 percent, is that correct?

A That's right.

Q Now, let me have you take a look at Exhibit 175. Is this a copy of an invoice from Volvo to Westfall Volvo in Kansas City [254] for the sale of a 2000 model VNL 64 T 610's?

A Yes. I would mention one other thing for clarity.

Q Yes.

A Ken was not yet understanding the difference between asking for the price of the truck at net and list. He knew the difference between that and list, but he used the list to ask for it. To him it didn't matter. We eventually got him to change. You'll notice the chassis price on that invoice is 87,761. Do you see that on line 20, Joe? Line 20, 81,761 compares to our same chassis of 81,761. It's just that both of those would be list instead of net.

Q Okay. You're looking here on the invoice column of 81,761 and on your concession request, that's what appears?

A Yes.

Q And so we are looking at the same chassis, same price level?

A Same price level; that's correct.

Q And this other Volvo dealer received 13 percent concession on this deal?

A That's right.

Q And that was on a sale to Farmland Industries. And how many, how many trucks were sold on that transaction?

A 14 or 15, 14.

Q Okay. You were looking at selling 10?

A Yes. Yes.

Q Let me show you Exhibit 176. Is this another copy of a [255] Volvo invoice to Southwest Missouri Truck Center, Springfield, Missouri, for the sale of a 2000 model VNL 64 T 610's, same price, same –

A Sure. Postmark date 12/8/99. It is an invoice to Southwest Missouri Truck Center in Springfield, Missouri.

Q And when I say the same price here, I'm not talking – that's not the final price. We're not talking about final price, because concession percent obviously affects that.

A Right.

Q Those are shown over here on this next page. So the concession affects obviously the price to the dealer.

A As well as the options.

Q All right. And 176-A reflects how many trucks were involved in this transaction?

A Ten.

Q Ten. And this dealer received 10.6 percent concession? And was able to make the sale?

A Yes. He received 10.6 and this is the invoice.

Q I have 183 on this comparison, but we are going to – we just – we are going to leave those Exhibits, Your Honor, for the jury to look at. I don't want to go through them. But those have been admitted I understand.

THE COURT: Well, they have been admitted, but I think there probably ought to be some identification or tying down of them before they –

[256] MR. BYARS: All right.

THE COURT: I have problems when we introduce an Exhibit and nobody mentions anything about it and it goes back with the jury.

MR. BYARS: I understand.

THE COURT: At least have them identified.

MR. BYARS: Okay.

BY MR. BYARS:

Q Bill, Exhibit 177, is that an invoice to Westfall Volvo where that again was the sale of 2000 VNL 64 T 610's?

A Yes. And the same postmark date range –

Q All right.

A – Westfall Volvo and GMC in Kansas City, Missouri.

Q And this is for the sale of how many trucks?

A It would indicate five.

Q Okay. And this dealer received 13 percent concession?

A That's correct.

Q And if we look at the invoice marked as Plaintiff's Exhibit 158, is that an invoice from Volvo Truck for this other Volvo dealer, Hughes Truck Center?

A 178?

Q Yes, 178.

A Yes.

Q All right. And for the sale of how many trucks?

A That's five as well.

[257] Q Okay. That's a 5.5 percent concession.

A Yes.

Q And Plaintiff's Exhibit 179, is that an invoice from Volvo to another Volvo dealer, General Truck Sales and Service –

A Yes.

Q – for the same –

A Yes, sir.

Q – the same, again, the same model?

A Yes.

Q Same chassis?

A Right, pricing the same.

Q Pricing on the same –

A On the base, on the base model.

Q But this dealer received a 6.3 percent concession on the sale?

A Yes, sir.

Q And this would involve the sale of how many trucks? Actually there was six. 6.3 on five and then the dealer got another seven-point –

A There's a mixture here. For some reason there's a difference in concession. This is a ten truck deal. Five of them have 6.3 and five of them have 7.1. I could not tell you why they're different.

Q All right. But they are both more than the five. Again, looking at Plaintiff's Exhibit No. 180, is this an invoice to all [258] Volvo and GMC trucks concerning the sale of the same, same truck model, same pricing?

A Yes.

Q And this dealer received a 7.5 percent concession?

A That's correct.

Q Next is Plaintiff's Exhibit 181. Is that an invoice from Volvo to another Volvo dealer, Tulsa Trucks, Inc, regarding a transaction for Melton Truck Lines, same model, same pricing?

A Yes. Joe, the pre-previous one was ten trucks. I don't know –

Q Okay.

A I'm sorry. I don't know –

Q We had how many trucks contemplated?

A Ten.

Q Right. This dealer received an 11.5 percent concession?

A Yes.

Q And if you look at the back page of this invoice to this other Volvo dealer, there's an additional says a concession adjustment?

A Yes.

Q Does that reflect an additional concession?

A Yes, it does.

Q So if we look at Exhibit 181-A, what this dealer got was a total of 13 percent concession?

A That's correct.

[259] Q And this involved the sale of how many trucks?

A Ten.

Q I've almost forgot now what you – you received a five percent approval concession?

A That's right; five.

Q And Exhibit 182 is a copy of an invoice from Volvo to General Truck Sales and Service reflecting the sale of a 2,000 Model VNL 64 T 610, same pricing in effect. This dealer received seven percent concession?

A Yes.

Q And this involved the sale of how many trucks?

A Six.

Q Finally Exhibit 183?

A Joe?

Q Yes.

A I have to have a meeting with him, I guess.

THE COURT: Why don't you approach the witness this time?

A I apologize.

THE COURT: He apparently has a question.

(Off the record at this time.)

Q Look back at Exhibit 182. On the first part of the invoice appears that this other dealer got seven percent. Right there on the back page of that invoice is an additional concession of $707, is that right?

[260] A $707 additional, that's correct.

Q And so the total concession that dealer received on the six trucks is 7.9 percent?

A Right. That illustrates how much a small percentage can change the price of a truck. That's $700 for .9 percent.

Q In the margins you deal with on these sales of trucks, in your experience does $700 make a difference?

A Yes, it does make a difference.

Q In looking at Plaintiff's Exhibit 183, is that a copy of a Volvo invoice to this other Volvo dealer, June, 1999, same pricing in effect?

A That's correct.

Q And this dealer received 9.5 percent concession?

A That's right.

Q Involving how many trucks?

A Ten trucks.

Q All right. We've just compared your transaction for I G W T to Exhibits 175 through 183, is that correct?

A Yes. We got done with the 183.

Q All right. Now, let me have you take a look at Exhibit 184. What is this document?

A This is a special price confirmation dated 2/25/1999 for Arkansas Refrigerated Lines, ARL.

Q Was this new business, new potential business for you?

A Yes.

[261] Q And Mr. Plemmons was trying to cultivate that account?

A Yes, sir.

Q And that involved the sale of ten, potentially the sale of ten VNL 64 T 610's?

A That's correct.

Q 1999 model?

A Yes.

Q And the concession request was 10 percent?

A That's right.

Q And the authorization was four percent?

A That's right.

Q This was then changed to 4.7 percent, right?

A You're referring –

Q Referring to the next page on Plaintiff's Exhibit 184.

A That's Suzanne Warren's notation, 4.7 percent.

Q All right. And then to 6.9 percent, is that correct?

A Yes.

Q And this was for the sale of 10 VNL 64 T 610's, the 1999 models in February 1999?

A That's right.

Q Document 184-A lists other retail quotes as we received from Volvo?

A Well, yes, it does.

MR. BYARS: Your Honor, could we approach one more time just real fast?

[262] THE COURT: Yes.

A Joe, could you come here real fast.

Q Sure. (Off the record briefly.) What does Exhibit 184 reflect, Mr. Heck?

A 184 is our original concession request for ARL approval of four percent.

Q I'm sorry. 184-A?

A I'm sorry. 184-A is a weekly summary of the retail quotes that were given out by Volvo for the week of March 4th.

Q The week following your requests to ARL?

A That's right.

Q Actually, it's the last one would have been within that week, wouldn't it?

A Well, one before and one after, I think.

Q Okay.

A No. When Suzanne Warren approved it to 4.7, it would have appeared in there. You betcha. There's one in there; yeah.

Q Okay. And the top line of this document says that would have been 64 T 610's, and that shows the month quarterly of 573 units?

A Model quantity.

Q Model quantity as of that date is the total there?

A Yes.

Q And the average concession on those was – note that model was 10.9 percent as of that date.

[263] A Of the quotes given out the week ending 3/4.

Q All right.

A Or the week of 3/4.

Q Let me show you what's been marked as Plaintiff's Exhibit 185. What is that document?

A That's a request. That's a special price confirmation request dated April 13th, 1999, for Carman, a local account.

Q All right. And is that new business for you or had you sold them before?

A I sold them back in the early nineties, maybe 93 or so. You know, the previous models of Volvo, not the VN's, certainly.

Q All right. And did you assist Mr. Plemmons in doing this request?

A I worked with him on it.

Q All right. And what was the amount of the concession that you believed was necessary to get the deal?

A Six percent.

Q And what was the amount of concession approved?

A Three.

Q And you received that approval on April 14th of 99?

A Yes.

Q And that was – these were for some VNL 770's?

A Yes. This would be VNL 64 T 770. There's only one 770.

Q And you were looking at the potential sale of 15 of those?

A That was – that is correct.

[264] Q All right. Now, if you'll look at Exhibit No. 186, that says new retail quotes as of April 15 of 1999, and your quote appears at this line, doesn't it, for Carman, Inc., VNL 770?

A Yes. It's in the middle of the group.

Q And for 15 trucks?

A That's right.

Q Concession at three percent?

A That's right.

Q And right beneath that is another Volvo dealer on the same model, the 12 trucks, beer trucks, that they received 4.1 percent?

A That's right.

Q There's another retail order detail. Now, that's a retail order detail which means that there would have been a sale, is that correct?

A Yes. That indicates orders as opposed to quotes.

Q That's as of May 13th of 99?

A Yes.

Q And does this document reflect a sale to another Volvo dealer of 770 model, 12 units, where that dealer received a 7.5 percent concession?

A That's correct.

Q Now, Exhibit 187, is this a copy of an invoice from Volvo to another Volvo dealer, RDO Truck Center in Dallas, Texas –

A Yes.

[265] Q – for the sale of the VNL 770's?

A Yes, sir; Dallas.

Q And that dealer received a seven percent concession?

A That's correct.

Q And how many trucks were involved on that transaction as shown on Exhibit 187-A?

A That would be ten.

Q Seven percent concession?

A That's right.

Q I'll have you take a look at Plaintiff's Exhibit 191. What is this document?

A This is a special price confirmation request dated April 14th, 1999 –

Q All right.

A – that I submitted.

Q And who was your customer or potential customer on this deal?

A USA Truck in Van Buren, Arkansas.

Q And had Reeder-Simco previously sold to USA Truck?

A Yes.

Q And what are the quantities involved and the different models involved in this transaction?

A Okay. The way to understand this is that you start out on the left. There's 563 model VNL 64 T 660's. Because the customer operated a model Freightliner, that would be more [266] comparable to that model, or I was attempting to give them an alternative where they would have 66 of those for the applications where they needed it. That

would be a nice team truck for two people to drive. And then 497 610's, which is which is better for a one – which most of their fleet is one river. So you can see it's a deal for 563. It's just two different combinations of trucks. And the concession was approved at 14 percent without regard to what the model was or the option pricing. We requested 25 percent.

Q Same concession across the board.

A Yeah.

Q And did you provide Volvo with all of the information concerning the deal that you could get?

A Yes. I – right, exactly.

Q And what – you rated the probability of getting the deal as a seven?

A Yeah, at 25 percent.

Q And how many – this was a manufacturer or a trucking company that had been purchasing Freightliner in recent years?

A Yes, sir.

Q And –

A Recent to this date.

Q The funding source was going to be the customer?

A That's right.

Q So there wasn't any financing issues on this deal, was [267] there?

A There was no finance issue.

Q All right. Let me show you Plaintiff's Exhibit No. 192. Is this a copy of an invoice from Volvo to another Volvo dealer, Ozark Truck Sales in Springdale, Arkansas, with respect to a transaction a sale to PAM Transport, Inc?

A That's correct.

Q And that was with regard to 2000 VNL 64 T 660's, is that right?

A That's correct.

Q This is on your first column of 563 units?

A Yes.

Q And this dealer received a 14.5 percent concession?

A Yes.

Q And this – other dealer also had some dealer funds available, is that right?

A Yes, sir.

Q When you're looking at the sale of 563 units and there's a difference in .5 percent on the concession level, what does that mean in terms of dollars and cents –

A To the customer?

Q – in the transaction?

A To the customer?

Q To the customer or to you?

A To me? Okay. At different of .5 percent?

[268] Q .5 percent?

A Okay. On the VNL 64 T 660, that would be 76,610. That's $215,000, $657 difference to me and it would be higher than that to the customer –

Q All right.

A – because of the federal excise tax.

Q Now, let me show you what's been marked as Plaintiff's Exhibit No. 193. Is that a copy of an invoice from Volvo to another Volvo dealer, General Truck Sales and Service in Memphis on the sale of the same model trucks?

A Yes. These are the 610's.

Q 610's?

A Yes.

Q And look at Exhibit 193-A. What was the concession amount granted to this other dealer for these trucks in June of 1998?

A Joe. This is not a fair comparison.

Q Okay.

A We're a year off.

MR. BYARS: Your Honor, let me just withdraw that 193?

THE COURT: 193 or 193-A?

MR. BYARS: 193 and 193-A.

THE COURT: They will be withdrawn.

Q Let me show you what's been marked and admitted as Plaintiff's Exhibit 194. These are other new retail

quotes as of April 22nd of 1999. And is that your bid that shows up right [269] here?

A Yes. That would be the 563. Right.

Q And concession amount of 14 percent?

A That was the approved amount.

Q And then we had this other quote that was approved for Estes Express involving 30, and they also got 14 percent.

A That's right.

Q In the concept of granting concessions, which makes sense, to grant a higher concession on a 563-truck deal or on a 30-truck deal?

A All other things being equal, the 30-truck deal should get less than the 563-truck deal.

Q All right. With respect to – there's a sale here or a quote indicating that that was a one transaction?

A Are we on 194?

Q Yes, 194.

A Okay.

Q With five trucks at 15.7 percent concession. That's correct?

A Yeah; that's correct.

Q Then there's another down here quote Land/Air Transport, a ten-truck deal, 14 percent.

A That's right.

Q Other quotes as of April 15 of 99, to First Fleet VNL 64 T 610's, quantity 25 at 16.6 percent, quantity of 40 at [270] 16.6 percent, correct?

A Yes.

Q Last one. Looking at Plaintiff's Exhibit 195, tell me about this one, Bill.

A Its our special price request dated April 8, 1999, for Love Box Company up in Springfield.

Q Had Reeder-Simco sold to this company before?

A No, not Love Box; no, sir.

Q So this would be a new business prospect for you in April of 99?

A That's right.

Q And what were the models and the year model and the trucks to be sold?

A These would be 2000 model what was called a WG 64 T.

Q And looking to sell four units, you requested six percent concession, is that right?

A That's right.

Q And three percent concession was granted –

A Yes.

Q – on this transaction?

A Right.

Q This customer had a fleet size of 30? The funding source was Bank of the Ozarks?

A Right. It's a Mack account.

Q And this request was in April of 99. Let me show you. This [271] is what's been marked as Plaintiff's Exhibit 196. Is this a copy of an invoice from Volvo to Ozark Truck Sales, Springdale, for the 2000 model WG 64 T –

A Yes.

Q – where this dealer was given a concession of seven percent –

A That's correct.

Q – and resulting in a sale of Volvo to that dealer? Of course, the dealer's the customer. How many trucks were involved in this transaction that's shown on 168-A?

A 196-A perhaps?

Q Yes.

A Ozark Truck Sales, one truck, seven percent concession.

Q And the date of that was March of 99, right?

A That's right.

Q Exhibit 197, is that a copy of an invoice from Volvo for a sale made to Great Southern Trucks of 2000 model WG 64 T's?

A Yes, sir.

Q And this dealer received a 6.5 percent concession?

A Yes. Well, it's hard to tell. 197-A says 7.42, and I believe that this later data is more accurate of the two data sales. This is June 1st, 2001, data. It was verified.

Q And this was – the postmark date on this was December of 99?

A That's correct.

[272] Q Now, even though it's December of 99, now, on your – there's no – there's no pricing differences at the same price level as your quote in April of 99, is that right? Your chassis we are looking at is 69,776, and as shown on I guess this was the Plemmons matter. He showed 69,776, which is the –

A Yeah. That was just Ken, you know. He –

Q That's – the dealer list is the same, so that indicates the same pricing level?

A Right. When you net it out, it's $55,820.80, so it's the same number. It's just the different representation. It's a list instead of net.

Q All right. Thank you.

MR. BYARS: Your Honor, I'm about to move into another area.

THE COURT: We are going to move out of this area for about 20 minutes, long enough to take a break to about a quarter till 3:00, but remember the prior admonitions of the Court not to discuss this anyone nor allow anyone to discuss it with you. We are going to remain seated until you're out of the room. Have a nice break and we'll see you in 20 minutes.

(Off the record at this time. The following proceedings were had outside of the presence and hearing of the jury:)

// THE COURT: Anything anybody wants to put on the record with the jury out of the room? It's 3:25? I would like probably – I don't think you guys have had a break since lunch,

* * *

[274] [Deposition Testimony of Hugh Samuel Johnston, read into the record on January 15, 2002. Located *infra* at JA 391 through JA 405.]

* * *

[Testimony of William E. Heck (resumes)]

[280] BY MR. BYARS:

Q Bill, yesterday we heard a limited mention of your meeting with Stan Boris, and I'd like for you to explain the circumstances of that meeting and what was discussed.

A Mr. Boris arranged the meeting with David Reeder and David asked myself then Hershel to participate because we are all owners, and as the meeting took place, Mr. Boris asked David if he could speak to him privately and David said, well, of course, Bill and Hershel are also owners of this business. And Stan Boris proceeded to tell us of an interest on the part of MHC of Kansas City to buy our dealership.

Q All right. And then what was your reaction?

A We were quite surprised, and, you know, we, we at that time had not thought or were interested in selling the assets of our dealership.

Q All right. And did you ever receive after that time any type of an offer?

A No, sir.

Q All right. Did this meeting occur prior to the Marco Island meeting that was described in March of 1998?

A Yes, sir.

Q In 1999 did Reeder-Simco receive a termination letter from Volvo?

A Yes, sir.

Q That was admitted yesterday as Exhibit No. 54, which we read [281] in the courtroom yesterday. Remember that?

A Yes, I do.

Q And what was your reaction upon receiving that letter?

A At first we were, we were very upset. David received it. It was addressd to him and he called me over and he asked me to read it, and we sat down and tried to, tried to figure out what to do.

Q All right. And what were you thinking about doing at that time?

A Well, we had two choices. We could let time flow and at a point in time we would not be a Volvo dealer, or we could decide to not take it and not take the defeat and go ahead and do what we could to remain a Volvo dealer.

Q All right. Do you believe you were terminated as a dealer?

A Yes.

Q Do you currently have a franchise agreement with Volvo?

A No, sir.

Q Let me show you what has been marked as Plaintiff's Exhibit No. 289. What is this?

A That is a dealer directory published by Volvo for the year 2000. That's what it is.

Q All right. And what's the purpose of that directory?

A It's so customers can locate a dealer for the purpose of parts and service and repairs on the truck.

Q And is Reeder-Simco published in the 2000 directory?

[282] A No, sir.

Q Bill, from your experience at General Motors, did you have occasion to be involved in the purchase of dealerships, selling of dealerships?

A I was involved to the extent – I was involved.

Q All right. And explain just a little bit about your involvement in that.

A I would assist in sometimes bringing two parties together where one person might be interested in going out of the business so to speak so as to retire and he needed to, you know, get some value, and then the new party needed to be made aware of the potential that the franchise would make available to them in their area.

Q And at GM you also had the opportunity to run the operations of a dealership, is that right?

A That's correct.

Q And when was that?

A 1980, 80, 81.

Q And that's prior to you going to Reeder-Simco?

A Oh, yes.

Q And in that experience were you involved in the sale of heavy trucks?

A Yes.

Q And how long have you had experience in the area of heavy truck sales?

[283] A Since 1976.

Q As a business owner and operator, what information is important to you in evaluating the going concern value of a franchise such as the Volvo franchise you had under the 1995 franchise agreement?

A As an owner, I wished to evaluate the amount of money it's producing, its earnings, its profits.

Q You have an understanding of present value and future value financing concepts?

A Yes, sir.

Q Bill, with regard to these objectives that were set by you, set by Volvo to Reeder-Simco, put them up here, the objective numbers that were assigned for new truck

sales, did you have a problem with those objectives as they were set?

A Not with the objectives themselves with the exception of 1997 where I did ask them to reduce it a little and they did agree and I thought there was a different problem with the objectives.

Q All right. Well, what was the problem with the objectives?

A I was unable to obtain them because Volvo was not functionally giving me the same discounts as they were to other dealers, so I felt if my objectives were being set on the same basis as other dealers, I should have the same pricing base to compete.

Q And so you believe that the numbers set, but for the conduct [284] of Volvo, were reasonable objectives?

A Yes, sir.

Q But given the circumstances, they weren't reasonable?

MR. WILLIAMS: Your Honor, I think they're leading now, and asked and answered as well.

THE COURT: Well, I think it has been asked and answered, but you can rephrase your question. Your objection will be sustained.

Q Let me move on. Bill, what was the heavy truck sales market doing in 1998 and 1999?

A It was well on its way to achieving all-time record volume.

Q What was happening to the lead time at Volvo to get orders out?

A It was becoming more and more extended. It took longer. Lead time is the amount of time between when you order the truck and when the truck is built and shipped to you, and it was getting longer and longer.

Q Okay. Well, explain a little bit about the lead time. What do you mean? When you order a truck for a sale, just explain a little bit about what's meant by that?

A Well, the plant only has the ability to build so many vehicles a day. And they can't change that rapidly. They have to stay at a certain pace. And when I visited the plant during these periods of times with fleet customers, I could see that more people were being hired and more people were being trained [285] and the daily production rates were growing higher and higher, and in spite of that, the lead times were getting longer and longer where we might be able to obtain a truck in 60 to 90 days in the case of Lane Freight, we saw it was 150 days between the time we ordered the trucks and when we got them, and that was not a request of ours.

Q And what does that tell you about the capacity of the Volvo plant during that timeframe?

A It told me that the plant was being operated at its capacity and they were taking steps to increase the capacity as rapidly as they could. I saw them moving processes out of the plant for example where they could, you know, change it to a final assembly and not so much subassembly.

Q And how does that mesh with this concept that a loss sale to Reeder-Simco was a loss sale to Volvo?

A Well, I would say it certainly reduces the expense to Volvo of a loss sale for Reeder-Simco because they were pretty much building all they could at that period.

Q Does Reeder-Simco prepare detailed operating reports on a monthly basis?

A Yes, sir.

Q Okay. What is the operating report?

A It's based on the General Motors Standard Accounting System and it tracks our expenses, our sales, creates profits, keeps track of the assets and the liabilities. It creates a balance [286] sheet and an income statement so to speak.

Q And is there a standard format for the financial statements?

A That's what I'm – that's what I meant by the General Motor Standard Accounting Format.

Q And are these submitted to General Motors on a monthly basis?

A Yes, they are. Yes.

Q And is there some mechanism whereby those same operating reports are also sent through GM to Volvo?

A Yes. I can only understand. I don't know the technique. I know that I report to General Motors and Volvo receives those reports.

Q What information concerning heavy truck sales is included in the operating reports?

A On a monthly basis, the number of units that were billed out that month, the gross sales value, the cost of sales, the resulting gross profit, and the average gross profit per unit which is the volume divided into that, and then there's a running total kept for year-to-date, so you have month and year-to-date for heavy trucks, and it's broken down by model somewhere.

Q And have you reviewed all of Reeder-Simco's operating reports since 1990?

A More the annuals. From time to time I would have interest in a monthly report, but I've reviewed the annuals more than the monthly reports.

[287] Q And in preparation for your testimony in this case, have you prepared a summary of the operating reports?

A Yes, in a limited way.

Q All right. Let me hand you what's been marked as Plaintiff's Exhibit No. 268. Tell us what this is, please?

A This is a recap or a summary of our operating reports containing a year, total units sold, Reeder gross profits on those Volvo sales, and our average gross profit per unit.

MR. BYARS: Your Honor, we move for the admission of the summary of the operating reports, Plaintiff's 268.

THE COURT: We think it it's already in evidence, came in on Monday, 268.

MR. SHANNON: That's what my records show.

THE COURT: Let's make sure the one we've got is the one you're using though, Mr. Byars, before you put it up.

MR. BYARS: Sure. I need some assistance getting this thing working. (Off the record at this time.)

THE COURT: You know, when I first started practicing law, you could even smoke, jurors, you know, and judges smoked during the trial, but we've come a long way. So . . . but, Miss Porter, if you need – if you've got a bottle of water or whatever you need, you sure can. It's kind of dry in this courtroom too and I think that does help. We were making progress and then –

MR. BYARS: My foot just hit the little button down [288] here.

MS. PORTER: Okay. Its just takes a minute to reset. (Off the record at this time.)

THE COURT: This equipment does – as many Exhibits as we have or are going to have, this saves several days of time I assure you of passing them back and forth. It's marvelous equipment. It's expensive equipment, but we do from time to time develop a glitch and we apologize for that. Let's go back on the record and go ahead and continue. Thank you, Mr. Byars.

BY MR. BYARS:

Q Mr. Heck, Exhibit 268 is now on the overhead, and on the column it says Reeder gross profit, and the gross profit figure is per year or listed, is that right?

A That's right.

Q Listed on there?

A That is correct for Volvo.

Q Now, what is gross profit? What are you calling gross profit in that column?

A In this sense, this is the difference between the sale price and the cost of sales, which includes what we paid for the vehicle and various other expenses.

Q Well, does it include interest expense on your fleet sales?

A On the majority of fleet sales it does, the great majority.

Q So the interest on fleet sales has already been netted out when it comes to your cost of sale, is that correct?

[289] A In most cases I order it on the invoice of the truck.

Q What about insurance?

A Insurance is not included in that.

Q Okay. So that would be an additional expense item that would need to be netted out of the gross profit?

A Yes. Insurance is $30 per vehicle.

Q Okay. That basically covers you until when you get the trucks in until they can be shipped back out, is that correct, on your floor plan?

A Right. The purpose of the insurance is to protect me while the truck is in my control.

Q Sure. I was just wondering why it would only be $30 per truck?

A Because ordinarily the trucks – I can't afford to have them stay around. I have to bring them in. Get them in the hands of the customers, pay the trucks off. And the $30 is a high average. Many of these trucks would be slightly lower, but it's not worth it, you know, it would be $25.

Q All right. Are the sales commissions expense included in your cost of sales?

A No, sir. On my sales there is no sales commission. I'm not a commissioned employee. When the salesmen did participate in a fleet sale or a stock sale, and they were commissioned, we would calculate their commission, but it would not be included in these figures.

[290] Q Okay. And so in coming up with the net profit, that would be expensed out?

A If we were to create net, you would have to take that out.

Q All right. Well, what are the other items that are included in your cost of sale, deductions I guess from the what I might call the gross profit? They are already included in this figure?

A By cost of sale, again, it starts out with what we paid the factory for the trucks. That's where it starts. Then anything we do for the truck, if we have to put $20 worth of diesel fuel in it, so it doesn't run out of fuel while it's in our possession, the $20 goes against the truck. Any fluids that are added to it that are not reimbursed by the factory, any repairs that are necessary that are not covered under warranty, any delivery expenses, if I pay somebody $20 to drive it to a customer or $300 to take it to Houston, those are included in that figure. Anything that I can assign, I

know I spent it on that truck, that's how our accounting system works.

Q So all of those figures have already been taken out and what's left is this gross profit figure?

A Yes. It's not strictly the difference between the sale price and the factory invoice.

Q And have you prepared a lost profit estimate quantifying what element of damages were caused by Volvo?

A Yes, I have.

Q Let me refer you to Exhibit 272. Have you identify that.

[291] A This is a chart I put together and it uses years 96, 97, 98 99, 2000. It lists various objectives, various information to come up with a sales projection of lost profit.

Q And where did you obtain the information that is set forth on Exhibit 272?

A Well, the various, the sales objectives came from what objectives we were given by Volvo. The Reeder sales came out of our financial statement. The difference is just math. The Reeder average gross profit came out of our year-end operating reports. The lost gross profit is the difference between our objectives and what we actually sold. The Volvo dealer average gross profit was obtained in two stages. We asked questions of Volvo and they gave us material back and indicated what the average dealer gross profits were in a form that involved different models. And so I took our model sales experience and adjusted those

numbers using their numbers to get a weighted average and I came up with a Volvo dealer average gross profit.

MR. BYARS: All right. Your Honor, we move for the admission of Exhibit 272.

MR. WILLIAMS: May we approach the bench, Your Honor?

THE COURT: Yes, you may.

(The following proceedings were had at the Bench between Court and counsel and out of the hearing of the jury:)

THE COURT: You moved the admission of 276. I think it was 272 that you meant.

[292] MR. BYARS: I'm sorry, 272.

MR. WILLIAMS: Your Honor, let me turn it around for the Court. This damage calculation includes 1996 and if it comes in at all, I think it has to be subject to a limiting instruction because the damages shown on here are under the franchise practices act.

MR. BYARS: We're going to get into that. We are going to adjust that in form. We plan on doing that. We're going to have the figures adjusted for February of 97 and then the separate one from after February of 96. This is just to give us the basic numbers and then we're going to make these adjustments here in Court.

MR. WILLIAMS: Well, it's an Exhibit. That's why I raised –

THE COURT: Do you have an Exhibit 272-A or B that would –

MR. BYARS: No. We are just going to show how we come up with the adjustments to come up with the numbers.

MR. WILLIAMS: Your Honor, there's a prejudicial effect here by putting this in and then just orally doing it. I think we ought to have a –

MR. BYARS: We will do it in writing. We're going to make notations to develop a 272-A and 272-B. This is sort of the foundation material from which we are going to show how we're making the adjustments.

[293] THE COURT: Well, I don't know how to let it in unless we do use a limiting instruction at this point. Do you have a preference on A, B or C? We ought to have these tatooed someplace.

MR. SHANNON: C is going to be the closest.

MR. WILLIAMS: Well, actually even C is not correct because it talks about the incident is on the issue of liability or bad faith, so I think it goes only to damages.

THE COURT: Well, what if then –

MR. BYARS: We can deal with it.

THE COURT: What if it's admitted but they are instructed they're not to consider anything for the year 1976?

MR. BYARS: 1996.

THE COURT: Yeah, 1996.

MR. BYARS: Well, the problem with that would be that going back four years from February 2000, 96 should be included for Clayton Act purposes.

MR. WILLIAMS: But not January.

MR. BYARS: No, that's right. And we are going to make that adjustment.

MR. WILLIAMS: Well, Your Honor, I think the judgment would be before we get to Court and put two numbers before the jury. I think it's prejudicial to the defense.

(Off the record at this time.)

MR. BYARS: In the jury instructions –

[294] THE COURT: I can handle the jury instructions. I'm worried about that exhibit. What about you may consider only 11 months, the last the last 11 months of 96 for the Clayton Act and then it's not to be considered at all under the Arkansas Franchise Practices Act?

MR. BYARS: No – oh, for 1996?

MR. WILLIAMS: That's what he said.

MR. BYARS: And then you may only consider the values for Arkansas Franchise Act following 11 months –

MR. WILLIAMS: February 9th.

MR. BYARS: – from February 9th of 1997.

THE COURT: Okay. We think we are going to have a deal – are we going to have anymore of these that may be – you know, I feel better about this –

MR. BYARS: This is the basic one that we are going to use to develop – I mean we're not going to use any more –

MR. WILLIAMS: Your Honor, I think they have got some others. They have got to clearly include 96 in the calculations.

MR. BYARS: We are not going to use those.

MR. WILLIAMS: Not going to use those?

MR. BYARS: No.

(The following proceedings were had within the presence and hearing of the jury:)

THE COURT: Ladies and gentlemen of the jury, with reference to Plaintiff's proposed Exhibit No. 272, I'm going to [295] admit that exhibit. It contains some information concerning several years to include the year 1996. This is a Limiting Instruction and I'm telling you that, although it reflects 1996, only the last 11 months of 1996, that is, everything but January may be considered by you in connection with the Plaintiff's claim for price discrimination under federal law. And under the Arkansas Franchise Practices Act, none of 1996 that you're going to see can be considered by you in arriving at damages. So with that Limiting Instruction, you may – I am admitting Exhibit 276 – 272.

MR. BYARS: Thank you, Your Honor.

Q All right. Bill, what I'd like for you to do is with reference to this chart we've got for year 1996, the sales objective set by Volvo was 89 units, is that right?

A Yes, sir.

Q And the actual sales was 66.

A Yes.

Q So the difference between the two was 23 units?

A That's right.

Q Does this column here show the average gross profit per unit based on your actual 66-unit sales?

A Yes, it does.

Q All right. And so this column here where it says lost gross profit?

A Yes.

[296] Q That's simply 23, the difference times your average gross profit that you made on these 66 units, is that correct?

A That's exactly how that's done.

Q All right. And you did the same for each of the following years from 97 to 2000. The sales objectives here, actual sales, the difference, multiplied by the average profit based on your actual sales to come up with the lost gross profit figure, is that correct?

A That is correct.

Q Now, with regard to the year 1996, the calculation includes the full year, as it shows here on 272.

A That's 12 months.

Q So we need to take out a month, don't we?

A Sure.

Q And would you do that calculation so we can adjust the number?

A Yes. If we do it on a total basis, one-twelfth of the 57,684, is $4,807. That would be one month.

Q So the 57,684 needs to be reduced by the figure you just mentioned?

A By 48.

Q And what was that –

A Excuse me.

Q 57,684 is reduced by the number you just mentioned?

A Right, which is one month worth.

[297] Q Right. And so what is that number?

A 4,807.

Q And what's 4,807 minus 57,684 or 57,684 minus that number?

A 52,877 is the resulting figure.

Q All right. Now, this column to the right, what does this column represent?

A That is the number calculated based on information we received as a result of our questions where I adjusted it for our actual sales experience to create a model balance. Some of those years had models difference.

Q All right. And what I'm going to do is I'm going to refer you now to Plaintiff's Exhibit No. 211, and are these the – are these Volvo's answers to our questions?

A For that question set, I think, yes.

MR. BYARS: All right. Your Honor, we would move for the admission of Exhibit 211.

MR. WILLIAMS: No objection, Your Honor.

THE COURT: And that's an interrogatory to Volvo and their Response?

MR. WILLIAMS: Yes, Your Honor.

THE COURT: It will be admitted without objection, 211.

Q The question we asked Volvo was please state the dollar amounts of the average gross profit per truck by model, if available, for all Volvo dealers for each of the years, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001. In connection with [298] this interrogatory Mr. Patterson stated at page 60 and 63 of his deposition that the gross profit figure per truck is approximately $3,500 for the year 2000. Please provide these gross profit dollar figures for each of the years requested. The information received is shown here on the Response where they're listed here on Response to Interrogatory No. 2 for Volvo.

THE COURT: Mr. Byars, you can make that a little larger, but be careful not to unhook anything.

Q The models are shown here on the left of these columns, and for example, for the VNL model series, the gross profits per year are shown here and here. And is it your understanding that, Mr. Heck, that that represents the average Volvo dealer's gross profit per unit for those years and that model?

A Yes. That's my belief.

Q All right. And so in coming up with your – the information on the chart here on 272, what does – how did you come up with these numbers here for what the other Volvo dealers' gross profits were?

A Again, I took what we sold and created a model mix that would be available in our territory. And I used the different models that were on that chart you just had up there and I weighted them based on our sales of different models, so if I sold half of one model, I used – I weighted the average for that model half and I multiplied it and then divided.

Q All right.

[299] A It's a weighting.

Q So for 1996, for example, Volvo lists the average gross profit per dealer here, and based on the model which you sold during the models you sold during that year, your figure represents the weighted average of their answer?

A Yes. It was based on the WIA figure, if you would move your chart down a little bit so we can see them, see WIA and then you go over to 1996 and it's 2797. So I took the number of WIA's we sold that year and applied that value to those, but then we sold some other vehicles that had – must have had more average gross profit and it caused the weighted result to be 2807 as opposed to 2797, a minor difference, but I wanted to be consistent for every year and not, you know, do it different.

Q Okay. And so there's a, for example, if we look at the Reeder average gross profit for 1996, your gross profit per unit was 2508, yet the average other Volvo dealers' gross profit was higher?

A That's right.

Q Is that right?

A That's right.

Q Same for 1997, where your average gross profit was 2353, And the other dealers' average gross profit was 3,209.

A That's right.

Q And for 1998, your average gross profit was $3,019 and the others were 3,171.

[300] A Right.

Q And yours was actually higher in 1999, your average gross profit versus the other dealers, and why is that?

A There's very little fleet sales reflected in that $4,000 average. We were not able to be successful in fleets, so the fleet lower averages were not within our average.

Q And your average gross profit for 2000 is lower than the average Volvo dealer's gross profit?

A Right.

Q Well, what would that mean, why was – why was your gross profit lower? Do you have an explanation for that?

A I believe we weren't able to receive the same discounts as we went through yesterday. That's part of it.

Q So as a result you were knocking down your profit?

A Yes.

Q We could make the adjustment here. And finally over here in this column, this lost gross profit. These profit figures are simply that they were calculated in the same manner as this column, but utilizing the Volvo dealer gross profit, the average other dealer's gross profits, is that right?

A Yes. The difference figure is simply multiplied by the Volvo dealer gross profit as opposed to Reeder-Simco's gross profit.

Q Okay. And so that number, if you utilize what the other dealers were getting as their gross profit, the bottom number [301] jumps up to $731,927.

A Yes.

Q This needs to be adjusted as well to take out a month.

A The amount that we need to remove is $5,380.

Q Okay. And what's the result?

A 59,181.

Q All right. Now, you had a $30 insurance charge per truck?

A Correct.

Q And based on the difference here, you would have had to take out the $30 for each of these units?

A Yes. I would, I would need to reduce the gross profit figure by that, if we wanted to obtain a more net figure.

Q I'm going to write insurance down here and what is the total, what is the total amount?

A $6,330 would be the total of all of those differences at $30 each.

Q In addition, the gross profit figures do not include the sales commissions expense, does it?

A That is correct.

Q So let me have you look at Exhibit No. 278. What is that?

A That's a summary of the salesperson's commissions that were paid during the same period of time.

Q All right. That's a listing per year?

A Yeah.

Q All right.

[302] MR. WILLIAMS: I'm sorry. What number?

MR. BYARS: 278.

Q And this would have been for the stock truck sales by –

A Primarily again, I'm not a commissioned salesperson.

Q Right. And so – Your Honor, we move for the admission of Plaintiff's Exhibit 278.

THE COURT: Any objection?

MR. WILLIAMS: Not at this time, Your Honor.

THE COURT: It will be admitted without objection.

Q If you would, Bill, we've got this broken down by year. What is the total? This is for 1996 through 2000. Would you add the total, the totals up, please?

A Just take it . . . 21,607, if you round it; $21,607.

Q Now, Mr. Heck, if you would adjust the totals based on the change for 1996, what are the results?

A The 696,718 figure becomes 691,911 with the January number removed.

Q All right. And for the other column?

A It becomes 726,547 with the removal of $5,380 for the month of January.

Q Okay. And then we have – you take out these two numbers, to give a net figure, reduce these two numbers from those totals.

A Okay.

Q What do we have?

A 663,974.

[303] Q And the other?

A Pardon me?

Q This column here?

A Oh, is that 726,547? Is that where we're starting?

Q Yes. (Pause)

A 698,610.

Q Say that again?

A I'm sorry. 698,610.

Q All right. Now, under the Court's Instruction, the Franchise Act, we cannot consider 1996, is that correct?

A That is correct.

Q So I'm marking this as Plaintiff's Exhibit 272-A, and – but what I would like to do is do the same exercise of removing the one month in 1997 from these two numbers. Okay. The new number for –

A Do you want the new number for 1997?

Q Yes.

A Is 53,923.

Q And the same for this other column here?

A 73,540 would be the new number.

Q All right. Now, if you would, total these four columns.

A Can you read me that top number, Joe? I don't want to make a mistake.

Q Yes, 53,923, 132,836, 276,241, 171,132.

A The new number would become 634,132. And we're working on [304] lost gross profit designed as our basis I believe, right? Yeah.

Q Check that again, Bill. 53,923, plus 132,836, 276,241, and 171,132.

A 634,132.

Q Now, this other column you would add 73,540, 139,524, 251,317, and 196,300.

A 660,681.

Q And, again, taking out the insurance and commission expense what are the – what's the total of these two?

A Okay. We're starting at 66397.

Q You want to total this, these two numbers, and then we'll reduce the next chart by that?

A That would be easiest; yes, that would be best. That result is 27,937.

Q And reduce these two numbers by that?

A Okay. Starting with 634,132, the reduced figure is 606,195.

Q And for the other column?

A Can you move it over so I can see that number?

Q I'm sorry.

A 660,681.

Q Right.

A Subtracting 27,937. That resulting figure is 632,744.

Q See 632,744?

A 744.

MR. BYARS: Your Honor, we move for the admission of [305] Exhibit 272-A?

THE COURT: Any objection over and above what we have already stated?

MR. WILLIAMS: Other than what we've already stated, Your Honor, over those objections . . .

THE COURT: It will be admitted.

Q Bill, when you sell new trucks, new heavy trucks, what does that do to your parts and service revenue?

A Well, it improves that in proportion to the increased sales volume.

Q These calculations did not include any of the additional revenue or loss pertaining to your parts and service revenue, did it?

A No. It does not include that whatsoever.

Q Was there – by reduction in sales, is there some reduction in the parts and service revenue –

A Yes.

Q – and profit?

A Yes, because your brand new vehicles are not coming in to be worked on or having parts put on them.

Q We have not put any amount in that calculation. You're not asking for that?

A Correct, not in the damages. I can't. I don't know how to do it.

Q What is the problem here?

[306] A We used the General Motors Standard Accounting Format and it does not separate the service and parts and body shop activities

Q As Volvo?

A It's just total. You know, as a business person, I'm not so concerned with what part I sold, just that I sold the part.

Q All right. And so the operating reports in your accounting records do not separate out Volvo parts and service from GM Parts and Service, is that correct?

A Not at all. It doesn't separate it at all.

Q All right.

A That is correct.

Q So you could not make those calculations?

MR. WILLIAMS: Your Honor, I object; asked and answered.

THE COURT: I'm overruling it. He may answer it again. I don't think he answered it in that form.

A Could you repeat the question?

Q Well, was it possible for you to come up with a calculation based on that loss?

A No.

Q With regard to these gross profit figures we've mentioned, that does not include a general reduction for your general overhead, does it?

A No.

Q Okay. What pays for your general overhead?

[307] A The parts and service predominantly pays for that.

Q All right. Is there any difference in your fixed cost overhead when you sell ten trucks versus one more truck?

A No, sir.

Q You've got that no matter what?

A It's going to be there.

Q Well, what we have attempted to do is take out all of the expenses related to your heavy truck sales and we've come out with these net profit, lost profit figures based on the information we had, is that correct?

A That's correct. I believe there's one more component.

Q Okay. And what's that?

A Advertising to be totally fair.

Q Okay. All right. The advertising expense, what is that? What does that typically run you on an annual basis?

A Slightly over $2,000 after we take out the funds that Volvo provides. This is strictly Volvo, not our total advertising.

Q So that's on a per year average?

A Yes.

Q And so for the 19 – well, for the calculation under federal law, we need to net out another five years at

$2,000, we need to net out another 10,000 for the advertising expense, is that correct?

A Yes.

Q And with regard to the – you help me with the calculator [308] here. We've got one, two, three, four years. Two years, $8,000?

A 8,000 works.

Q Just help me net that out real quick.

A 598,195. If you move it over, Joe, we can see it.

Q I'm sorry.

A 624,744.

Q You've got a lot of vehicles in stock, Volvo heavy trucks in stock?

A Yes.

Q And when were those ordered?

A They were ordered in the – ordered in – they were ordered in the Summer of 98, late summer.

Q All right. And of those vehicles ordered at that time, how many have you – well, how many were ordered?

A Somewhere between 35, possibly 38.

Q What year models do you have still in stock?

A They are 2000 models.

Q Have you been able to sell those?

A We've had difficulty with the ones that are left.

Q How many are left?

A Nine.

Q All right. And have you incurred interest expense on those trucks?

A Yes.

Q And that's an additional – you consider that an additional [309] element of damages?

A Yes.

Q Let me hand you what we've marked as Plaintiff's Exhibit No 277. Tell me what that is.

MR. WILLIAMS: What was the number?

MR. BYARS: 277.

A This is a listing of potential sales with a statement of lost profit.

Q All right. How did you prepare that document? What was that based on?

A That's based on the quotations, and a reasonable expectation of what our profit level should be based upon what our profit experience was for the same years for that model.

Q All right.

A Or sales actually, so the numbers should tie together.

MR. BYARS: Your Honor, we move for the admission of Exhibit 277.

THE COURT: Objection?

MR. WILLIAMS: Your Honor, may we approach the bench on this?

THE COURT: Yes.

(The following proceedings were had at the Bench between Court and counsel and out of the hearing of the jury:)

MR. WILLIAMS: Your Honor, just to make sure I understand it, to make my record, I thought Mr. Byars had said in [310] our previous bench conference that the only damage figure he was going to put in was the calculation, was the one he's just completed, and I'm not sure where he's going, so I'm not sure if I can frame my objection.

MR. BYARS: Your Honor, this is really not a calculation. This is sort of a support for our calculation. I mean this is – this shows what the potential was. We've just made the calculation, but we want the jury to understand what the potential was out there and why our figures are reasonable.

MR. WILLIAMS: Okay. So you are not – if I may ask, Your Honor –

MR. BYARS: We're not asking for that bottom figure to be awarded as a damage figure. This is offered in support of our calculation.

MR. WILLIAMS: And there's not – is there not going to be an alternative damage calculation based on the 300 sales per year?

MR. BYARS: That's correct.

MR. WILLIAMS: Okay. Okay.

THE COURT: Do you have an objection?

MR. WILLIAMS: No, Your Honor. I think these are – I think these are quotes that were given, so I don't know that I have any objection.

MR. SHANNON: He went through the numbers.

MR. WILLIAMS: Yeah, I think he did. I think he went [311] through these yesterday, so, no, Your Honor, I guess now that I understand where he's going, I don't object.

THE COURT: How much longer you going to be?

MR. BYARS: As soon as we leave this, we will go on to his opinion of the loss of the ongoing concern value of the business.

MR. WILLIAMS: Okay, Your Honor, that's something that we probably ought to go ahead and raise now. It's apparently they're going to want to submit to the jury and ask for both lost profits and the loss of the ongoing concern value, and that's double dipping. We've got authorities on that and we want to address that, and we can address that at a separate bench conference or perhaps at our break with the jury, but we don't think they can get both.

THE COURT: Yeah. Why don't we go ahead and let's go ahead, and as I understand 277 is going to be in without objection.

MR. WILLIAMS: Yes.

THE COURT: Let's go ahead and get to it, and then before you start with the other, we will take a break,

and then I think you may want to leave him there, and then let's go into that because I –

MR. BYARS: All right.

THE COURT: – and once we get – assuming you're permitted to do that, how long will it take? How much longer is [312] he going to be on the stand by you?

MR. BYARS: I think that will be close to it.

THE COURT: Well, close to it.

MR. BYARS: Well, I mean I – I think that's going to be it. I really do. You may be real surprised, but I think that's –

THE COURT: But – and if you are permitted to, how long will it take, you think, to get in that testimony, just one Exhibit or –

MR. BYARS: Now we don't have any documents on that.

THE COURT: Just going to do some testimony?

MR. BYARS: What we might do is demonstrate – you've seen me do this before with the – with writing out some numbers showing support for what numbers he gives for that.

THE COURT: Okay. Let's get this part of it and we'll take a break and then I'll let you guys take a break too and that we'll come back in. I've got concerns about where you're going or attempting . . .

(The following proceedings were had within the presence and hearing of the jury:)

THE COURT: I'm admitting without objection 277.

Q Mr. Heck, this exhibit you've prepared begins with potential sales you had in 1997, 1998, and beyond. As far as your calculations for 1997, in 1997 this does not include all of your lost potential sales, does it?

[313] A No.

Q Were the records that have been produced in the lawsuit – these are the numbers for 97. Had you gotten all of these sales, the profit potential there for 97 was 946,765, is that correct?

A We had the potential to do that getting this business. I'm sorry, yes.

Q And for 1998, we talk about a lot of these, the Beach Trucking, well it should be Southwest Financial, I believe, shouldn't it?

A Yeah. I don't recognize Sweet. That's – yes, you're right.

Q Danmarr Transit, REC Transport, DSL, ARL, Lane Freight, Land 0' Frost, ABF, Carco Carrier. The 1998 potential was $2,117,051?

A Yeah, we had the potential to do that.

Q And the 1999 potential what we're looking at you've got In God We Trust Trucking, ARL, Carman, Inc, USA Truck, Love Box Company, Hiland Dairy, Marrlin Transit, ABF, USA Truck, the 1999 potential was $1,538,903 with a potential for those years of $4,602,719, is that right?

A Yes.

MR. BYARS: Your Honor, I believe we are going to go into that other area now.

THE COURT: Ladies and gentlemen, I think we are at a

* * *

[319] Defendants kind of time to get –

MR. BYARS: Sure.

THE COURT: – to regroup.

MR. BYARS: Sure.

THE COURT: Ready to start?

MR. BYARS: Yes, Your Honor.

THE COURT: Let's bring the jury in.

(Off the record at this time. The following proceedings were had within the presence and hearing of the jury:)

THE COURT: You-all have a good break? Can you see why we don't have a lot of disturbances in Federal Court? Continue.

MR. BYARS: Thank you, Your Honor.

THE COURT: Mr. Heck, again, I remind you, sir, you're still under oath.

A Yes, sir.

THE COURT: Mr. Byars?

BY MR. BYARS:

Q Bill, as a business owner of Reeder-Simco, have you come up with an estimate of the going-concern value of the Volvo franchise as of after February 9th of 1997?

A Yes, sir.

Q All right. And what is your opinion of the on-going concern value of the Volvo franchise portion of your overall business?

A $1,200,000.

Q All right. And what was the basis for your opinion? How [320] did you – how did you come up with that number?

A I took steps to separate the Volvo profits, the share of the total business profits that we could assign to Volvo with the records that we had and used those separated out profits in an earnings model is the best description.

Q All right. And you utilized the operating reports of Reeder-Simco to arrive at that calculation?

A That's correct.

MR. BYARS: Your Honor, we move for the admission of Plaintiff's Exhibits 261, 262 – I'm sorry – 258, 259, 260, 261, 262.

THE COURT: Are those annual or monthly or –

MR. BYARS: These are – these include all of the monthly operating reports for each year.

THE COURT: 258 through 262.

MR. BYARS: Yes.

Q Were these either prepared by you or at your direction or business records? Is this part of the business records of Reeder-Simco?

A Yes. These are the – this is the General Motors Standard Accounting Report that we receive from General Motors after we send them a trial balance, sir.

THE COURT: Okay. Any objection?

MR. WILLIAMS: Okay. Your Honor, Mr. Byars didn't give us copies. If you'll just give us just a moment to get copies, [321] we don't have an objection so long as I have a copy I can have in front of me as well.

MR. BYARS: Your Honor, we did produce these, produced them early on in discovery.

MR. WILLIAMS: Yeah, but they're just not in the Exhibit volume. I was just wanting to make sure I have a copy.

THE COURT: I'm going to admit them without objection, but I will give you time to find them, Mr. Williams.

MR. WILLIAMS: Thank you. (Pause) Your Honor, it appears we have 93 through 2000. We don't have 92. 2001 which are within the ones Mr. Byars refers to, we don't have copies of those.

THE COURT: Do you have an extra copy you could make available to them?

MR. BYARS: We could make one available. These are so voluminous we did not reproduce them again to produce to Volvo. We had previously produced since 90 to Volvo.

MR. WILLIAMS: I don't believe we got 2001. I think we got the other, but I think that's –

THE COURT: Well, I'm going to admit them, but at the break we'll permit you ample time to either have copies made or you may use the Court's copy.

MR. WILLIAMS: Thank you, Your Honor.

THE COURT: Go ahead, sir.

Q Let me take a look at the 1996 report. Show that. This is [322] generally what 262 looks like, and as the first step in your calculation you first took the new Volvo gross profit figure for 1996, is that right?

A On page three. That's correct.

Q And that number appears right here, doesn't it?

A If that's line 28, that's the number we're looking for.

Q Right, line 28. And that's 165,499. All right. And what was the total gross profit with regard to all other new vehicles?

A That would be reflected on line 50 of that same page.

Q All right. And so the other vehicles gross profit is 637,452?

A That's correct.

Q So that's Volvo and this would be the other. And what's the total here?

A $852,951. That's the total vehicle gross profit.

Q That's the total vehicle gross profit, and so utilizing these two figures, did you arrive at a percentage of what the Volvo sales bears to the other new vehicle sales?

A Yes, I did, sir.

Q And what is that? What's the percentage?

A I'm coming with it. 20.61.

Q That's 20.61 percent related to Volvo sales?

A Roughly a fifth.

Q Now, what were the total 1996 earnings of the business? Where would that be reflected? And actually what you used was [323] the net earnings after deducting all expenses, is that correct?

A That's correct.

Q Is that shown here on page one of Exhibit 262 for 1996 where it says here –

A I can't – Joe, that's the only the month. I think I need to see the year.

Q This is, this is the year ending December 31, 1996?

A Right. That's the line we're using. This is line 55.

Q All right. And that total is shown here as the year-ending total. That's the net earnings of 920,832?

A That's correct, sir.

Q So the net earnings is 920,832. Now, what is 20.61 percent of the total net earnings for 96?

A $189,783.

Q And that would be the net earnings utilizing this formula attributed to the Volvo portion of the overall business of Reeder-Simco Truck Center?

A In proportion to the new truck sales.

Q All right. When you look at that where the gross profit on the sales of new vehicles was 165,449, and you compare that in proportion to the total net earnings, what does that tell you?

A That tells me that the business makes money in other areas such as used trucks, parts service, and body shop that are not reflected in just the sales gross profit.

Q Okay.

[324] A The same thing is said of the total gross profit for sales. It is less than the net earnings.

Q Well, in coming up with your total value of 1,200,000, explain how you do that.

A. All right. This is an earnings model. We go back for a five-year period to determine an earnings figure that can be attributable to the Volvo franchise. The Volvo franchise is an intangible asset. It allows us to make value with our other hard assets. It's intangible. All right? So we go back five years and we create this model of these net earnings attributable to the Volvo level of business, and we take that number and we divide it by five.

Q All right. That gives you the average net earnings over – the actual net earnings over the previous five years?

A That's correct, sir.

Q And that will give you a number to which you can apply a multiplier?

A That's a fact.

Q And we talked about Mr. Johnston had multipliers that he gave in his testimony yesterday?

A Yes, sir.

Q Do you know of multipliers that are also used in this industry?

A Yes, I do.

Q And what is the actual multiplier you believe would have [325] been utilized in 1997?

MR. WILLIAMS: Your Honor, may we approach the bench?

THE COURT: Yes, you may.

MR. WILLIAMS: Thank you.

(The following proceedings were had at the Bench between Court and counsel and out of the hearing of the jury:)

MR. WILLIAMS: I just want to restate so my record's clear on this that – and I think where Mr. Heck is going, he's now trying to qualify as an expert under Rule 702. I think this clearly is expert testimony and he is not qualified as expert in this, and we've said those grounds in our previous motion.

THE COURT: And I think as a business owners and someone who's been involved in a business, he can. I

thought he was going to testify about the value of the business and before and after all of this happened.

MR. BYARS: Yes.

THE COURT: All of this is somehow relevant to that?

MR. BYARS: I want to show how we come up with this figure, with the earnings.

MR. WILLIAMS: I think it's an expert methodology which he seems to be adopting after his deposition.

THE COURT: Well, I think these are reports apparently he generates or is generated by his company I think every month and they are sending – I think it's something he probably is familiar with and I think I'm going to permit him to testify from [326] it. You may cross examine.

MR. WILLIAMS: Okay. I understand. I just want to make sure of my record.

THE COURT: I understand and I want you to make sure –

MR. WILLIAMS: Thank you.

THE COURT: – you're covered.

MR. WILLIAMS: Thank you.

(The following proceedings were had within the presence and hearing of the jury:)

BY MR. BYARS:

Q What earnings multiplier are you familiar with as being used?

A For that period of time, five.

Q Okay. So what we've got here on the board is we've got the first year, the year end of 96 earnings figure for Volvo, and you took a five-year average of each of these going back, the historical actual earnings, and in 1995 what was the Volvo new sales gross profit?

A 1995 Volvo gross profit is 181,166.

Q And what was the gross profit attributable to all of the other new sales?

A 764,761.

Q And the total there is 945,927?

A That's correct, sir.

Q And for this year what percentage does Volvo sales relate – [327] how does that relate to the overall net earnings?

A 19.15 percent.

Q All right. And so we use this. That's basically 181,166 divided by this number. That's what it is, isn't it?

A Yes, that's what I did.

Q Okay. Now, what was the total net earnings of the business for 1995?

A Line 55 is $1,334,619.

Q Okay. And you're obtaining that from the operating report?

A I'm reading it off of it; yes. Yes, I am. I'm sorry.

Q Let me just do that. I've misplaced my pen now. I'm sorry. That was what?

A The net earnings figure?

Q Yes.

A Line 55 is $1,334,619.

Q And what is 19.5 percent of this figure?

A 19.15 percent of that number is $255,579.

Q So that would be the earnings related to Volvo?

A Yes.

Q Net earnings Volvo is this number here?

A No, that number you're writing down is wrong.

Q Not correct. I'm sorry. 255,579.

A Yeah.

Q That's the number for 1995?

A That is correct, sir.

[328] Q And, again, the gross sales, gross profit on the Volvo Trucks is again less than the proportion to the net earnings.

A Yes. As is total gross profit to total net.

Q So that number again shows you that you've got additional earnings from parts and service.

A Yes.

Q Let's do the same for 1994. What was the new Volvo sales gross profit in 1994?

A The same. 1994. Yes, sir. $169,215.

Q And what were the gross sales from all the other vehicles?

A Gross profit, sir, is 633,510.

Q For a total of what?

A 802,725.

Q And so based on the net earnings after all expenses, what is the amount attributable to the Volvo franchise? Is it 21.8 percent?

A 21.08.

Q 21?

A .08.

Q .08. percent?

A That's correct.

Q So what are the earnings attributable to Volvo for that year?

A Again, we would take 1 million.

Q Now, what you're about to give me is your net earnings [329] figure for the entire business, is that right?

A Sure, line 55.

Q Okay. And that's 1 million?

A Just write 1,025,935.

Q And then 21.08 percent of that is?

A 216,267.

Q So that would be the earnings figure for 1994 attributable to Volvo?

A That's correct.

Q Okay. 1993, you just give me those figures for 1993 earnings. What was the amount of the new Volvo sales gross profit?

A 83,205.

Q And gross profit from the sale of all other vehicles?

A The gross profit attributable to other vehicles is 523,227.

Q And that total?

A 606,432.

Q And so what percentage is the Volvo franchise compared to the gross profit?

A 13.72

Q And what was the total net earnings after expenses for the business?

A $818,875.

Q And what's 13.72 percent of that?

A 112,350.

[330] Q So that figure there is the Volvo earnings figure?

A For 1993.

Q For 93. And we've got four years. We've got – you take the average of five, is that right?

A Yeah, we needed one more year.

Q And for 1992 what was the total gross profit on Volvo?

A Total gross profit on Volvo that year was $563,582.

Q And what was the gross profit on all the other vehicles?

A Other?

Q Yes.

A Is $484,602.

Q What is that total gross profit on new sales?

A 1,048,184, 1048184.

Q And what was the gross sales of Volvo, what was the percentage for that year?

A 53.77.

Q All right. And then you take from your operating reports the total net earnings after expenses for the business, is that right?

A Yes, line 55.

Q And what was that?

A 1,312,579.

Q And what is 53.77 percent of this figure?

A 705,774.

Q Okay. And that would be the earnings attributable to Volvo [331] for 92, is that right?

A Yes, sir.

Q Now, if we add these up and come up with the average earnings for the five years prior to 97, take 705,774 –

A Seven?

Q – 705,774, plus 112,350, plus 216,267, plus 255,579, plus 189,783, and then you divide that by five to get the average earnings, which is what?

A $295,951 is the average.

Q Say that again?

A 295,951.

Q 295,951 is the average earnings for the five years

A Right.

Q And this is where the multiplier comes into play?

A That's a fact; yes.

Q And you believe it's five times?

A Yes, sir.

Q And what is that number?

A I should have agreed to the earlier number. The way we round it, it's $1,479,755.

Q One million, 479?

A 755.

Q 755?

A Yeah. That's the actual number.

Q And that would be under this earnings model, the value of [332] the business as of the end of 1996?

A The value of the Volvo franchise intangible asset would be this.

Q All right. And as of February the 10th of 1997, what was your opinion of the total value, the going-concern value of the franchise, of the Volvo franchise as of that time, 1,200,000?

A Yes. Actually 1,250,000. I misspoke before.

Q All right. Why didn't you use the $1,479,755? Did you also consider just the Volvo gross profit?

A Yes.

Q And you made – did you make a calculation using the Volvo gross profit?

A If you only used the gross profits from the Volvo sales, which excludes any possible profits from parts, service, used truck and body shop, that similar number would be a million one something.

Q All right. And you took the average of those two roughly –

A Yes.

Q – to come up with your opinion of 1,250,000?

A Right.

Q All right. Today do you have a Volvo Franchise Agreement?

A No, sir.

Q Were you terminated as of March 1st or March 31st of 2000?

A Yes, sir.

Q What is your opinion of the ongoing-concern value of the [333] Volvo franchise as of March 31st, 2000?

A Zero.

Q And why is that?

A I had nothing I could transfer to a potential buyer.

Q And you have an opinion as to the value of it today?

A I believe today's value is also zero.

Q And why is that?

A We're in this lawsuit and I don't know the outcome.

Q Just a moment, Your Honor. (Pause) Bill, I just want to make sure we've got an an understanding here. Yesterday we introduced a number of exhibits. We had a bunch of exhibits that we stated were produced by Volvo in discovery that looked a lot like this. You remember that?

A Yes, I do, sir.

THE COURT: Which, what exhibit are you now demonstrating on the screen?

MR. BYARS: This is 142, 142.

THE COURT: That was introduced yesterday?

MR. BYARS: I believe so, Your Honor.

Q. This New Retail Order Detail, is that something that's issued to the dealers?

A No, sir.

Q That type of information is sold by Volvo.

MS. PORTER: Don't have that one yet.

THE COURT: We don't have 142. You want to take it off [334] the screen? I don't think 142 was introduced, was it?

MS. PORTER: No.

THE COURT: So if you want to use an example, you may use one that was introduced.

MR. BYARS: All right.

Q Well, if you remember the documents which looked like that, I just want to make it clear that you didn't get access to that as a dealer, did you?

A That's correct. A dealer would not normally have access. I have access as a Plaintiff in this lawsuit.

Q All right. And yesterday we also talked about the matrix documents. Was Reeder-Simco ever made aware of what the matrix was?

A Again, other than this lawsuit, never.

MR. BYARS: I'll pass the witness.

THE COURT: Ladies and gentlemen of the jury, it's, I think time to take a lunch break. There's some things we need to discuss with the attorneys and maybe you can be first in line at the lunch place. I think we need to get back – we'll try to start promptly at 1:00 o'clock. We

may not be able to, but we are going to make a good faith effort to start at that point. Remember the prior, continuous, consistent hopefully, admonitions of the Court not to discuss it with anyone nor allow anyone to discuss it with you. Again, if you do go outside the building, be sure and wear your juror button, and that's not to have you

* * *

[453] A Right.

Q But the minimum 97 parts objective was $625,000 plus a little bit over that, correct? You see that?

A The minimum parts purchase objective.

Q Yes.

A Was 625,765.

Q Right.

A When this process was started one time before.

Q And they lowered that to $395,143.

A They did in fact.

Q Thank you.

A Yes.

Q Mr. Heck, you would agree with me, would you not, that when the majority of the time when you're competing for business on a Volvo transaction, that your competition is from other brands of trucks?

A That are – yes, that are quoting the deal at the same time I am.

Q Freightliner?

A The majority would be described that way.

Q Yes. Thank you. How many times have you actually competed with another Volvo dealer in the last five years on a concession quote?

A At the same time where I –

Q Yes.

[454] A – where I knew –

Q Yes.

A I would say it was several, you know, several.

Q Several?

A Yeah.

Q I mean –

A Two, three.

Q Two or three? Okay.

A That's right, at the same exact time.

Q Of the – all of the quotes that you have actually worked on that you've already testified about?

A That's my belief and answer; yes, sir.

Q Two or three. Okay. And you view a favored dealer when you are doing the comparisons as one who receives a higher concession than you did and you've testified to that, correct?

A That is, that is part of the definition. That's a big part. Yes.

Q Would you look at Defendant's, excuse me, let me get it for you. You don't have it in front of you I don't believe. I want you to look at Defendant's Exhibit 18.

A I do have one of your books up here.

Q Okay. If you do have No. 18, if you could look at that please.

A It's not inclusive of 18.

Q Okay. We'll give that to you in just one moment. While

* * *

[489] returns and the actual earnings as reflected on your year end operating reports?

A The ordinary income number off of that tax return is after our accountant has taken the proper depreciation and the LIFO inventory adjustments and the various other things, and I'm not able to list every one of them, but that's what he does. He does what is supposed to be done to create ordinary income.

Q When you utilize the earnings model which was presented in court, which of those is utilized?

A You use earnings. We didn't talk about using ordinary income. We use earnings. That is what is commonly used for that multiplier process.

Q All right. A moment ago Mr. Williams was asking you about the Hiland Dairy quote. Let me show you and I think he asked you whether you knew what the actual initial quote was that was given to the other Volvo dealer.

A Yes, he asked me that.

MR. BYARS: Your Honor, I believe the Plaintiff's exhibit 155-A has been admitted.

THE COURT: Miss Porter?

A Should I look at that, Joe?

MS. PORTER: Yes, it has.

THE COURT: It's been admitted.

Q I'm sorry. I need to refer to 198-A. Has that been admitted?

[490] MS. PORTER: No, 198 and 198-B has, but not A.

Q Let me show you what's been marked as Plaintiff's Exhibit 198-A. Can you identify that, please?

A Yes. This is a Volvo confidential chart new retail order detail as of 10/14/99.

Q All right. And it has other pages also attached to that Exhibit, doesn't it?

A Yes, sir, several pages.

Q They have different headings?

A Yes, they do.

Q Those were all produced by Volvo –

A Yes.

Q – in the discovery portion of this case, is that right?

A Yes. And they do – some of them are quotes as opposed to order detail.

MR. BYARS: All right. Your Honor, we move for the admission of Plaintiff's Exhibit 198-A?

THE COURT: Any objection?

MR. WILLIAMS: No objection, Your Honor.

THE COURT: Be admitted.

MR. BYARS: I'm going to refer you to what's listed here at the bottom as VTNA 8485, second page of Exhibit 198, and up here at the top, the name of this document is new retail quotes as of August 26th, 99. Do you see that?

A Yes.

[491] Q And based on the information we've obtained through discovery, do you have an understanding that these reports like this are generated weekly?

A Yes. As of 8/26, and then there would be one as of 8/19.

Q Okay. Now, on a Hiland Dairy quotation, where you sent in your RSA request, the concession amount you received was 7.5 percent, is that right?

A That's right.

Q Now, this other Volvo dealer, on the new retail quotes form it shows that the other Volvo dealer got 8.4 percent. Can you read that, is that correct?

A Yes. This shows 8.4.

Q All right. Now, on this other quote listing here, now your bid was for 12 vehicles, wasn't it, or your request for concession was 12 vehicles?

A Yes.

Q Now, there's another one here requesting 12 vehicles of the same type and another dealer got 8 percent, is that right?

A Yes.

Q And another one at 12, 12 vehicles, same vehicle at 8.7 percent, is that right?

A Yes. And that's within our region.

Q Okay. The next page VTNA, the next page of that Exhibit is VTNA 8464?

A That's right.

[492] Q Reflecting also bids or concession and approvals for Vulcan Chemical of ten trucks, same type, at 9.2 percent, correct?

A That's right. Ten for 9.2 percent.

Q And also another Volvo dealer got an approval for this customer, ten trucks at 10 percent.

A Yes. These are quotes.

Q All right. Another quote which was apparently of Won Trucks at 11.4 percent, correct?

A Sure.

Q Now, on your quote to Hiland Dairy, when you are designating the brand of – or outlining what the components will be on the truck, it says that just the transmission manufacturer, is that right?

A That's correct. Model number, manufacturer.

Q The brand for the rear axle is Meritor?

A That's right, sir.

Q And that's the information on which Volvo uses to make its concession approvals, this information here. Is that your understanding?

A That's what they say, but see, see so many that have that information at all and they still got an allowance bigger than mine.

Q Now, in regard to these, it doesn't provide any further breakdown as far as the capacities of the rear axle or anything further than just the manufacturer brand?

[493] A That's right.

Q And now you do on the engine have a horsepower, but would there be various models of Cummins that might have the same horsepower?

A Yes.

Q And that's not something that's taken into consideration, is it, by Volvo?

A I don't see how it could be. We don't tell them.

Q All right. Defendant's No. 296, do you have that handy?

A Defendant –

Q Okay.

A I think I do. I have it.

Q All right. Defendant's 296 was the letter you received in March of 2001 offering a new dealer agreement, is that right?

A Yes. This was a cover letter.

Q When did your dealer agreement expire?

A March 31st, 2000.

Q So this is a year later you're being offered another one?

A Right.

Q And do you have knowledge that other Volvo dealers were offered a different or newer agreement prior to the time you were?

A Yes.

Q All right. And about when was that?

A I believe it was in the summer, like maybe May or June as [494] Volvo has stated the mandatory binding arbitration clause had to be removed and some statements require a period of review before you can execute that agreement, so that created a delay of several months.

Q So you're talking about the Summer of 2000?

A I mean it's several, some months, several months, not a year.

Q Okay. Now, when you received – this letter here says that it congratulates you on the recent order by ABF and they set your 2001 new truck sales objective for 523 units?

A Yeah.

Q Now, in all of these prior years had you ever received a sales objective near that?

A You don't have – I never have. Joe, you don't have to look.

Q Okay. 523. Under this new agreement that was presented to you, it's Defendant's Exhibit 454. Is one of the differences in this agreement that from the older agreement that it provides for an immediate termination or a termination without being given a cure status for an evergreen contract as in the old if you failed to meet an objective?

A Yes.

MR. WILLIAMS: Object to the form; compound question.

THE COURT: It's overruled. You may answer and I think you did.

[495] A Yes.

Q Does the new proposed agreement have provisions in there restricting your ability to bring an action in court against Volvo?

A Yes.

Q Does it contain provisions in there restricting or allowing for the ability of Volvo to sell direct in Arkansas?

A Yes, it does.

Q Did you write back to Mr. Winner with regard to your concerns about the new proposed agreement?

A Yes; Reeder-Simco did.

Q All right. Let me show you what's been marked as Plaintiff's Exhibit No. 332. What is that?

A This is a letter dated April 13th, 2001, signed by David Reeder, William Heck, and Hershel Cole. Those are the owners.

Q All right. And was that a letter compiled in response to Mr. Winner's letter?

A Yes, sir.

Q And was that sent out on or about the date shown on the letter?

A Yes, it was.

MR. BYARS: We move for the admission of Plaintiff's Exhibit 332.

THE COURT: Would you show it to Miss Porter? I need to see it.

[496] MS. PORTER: Okay.

THE COURT: It will be admitted as Plaintiff's Exhibit 332 subject to the prior ruling of the Court or in accordance with the Court's prior ruling.

Q This letter states that in late March we received your letter dated March 16, 2001, offering a new dealer sales and service agreement to commence April 1, 2001. Volvo's offer of a new franchise agreement has required considerable but guarded thought and study by each of the principals at Reeder-Simco in light of the past dealings between us. As you may know, Reeder-Simco received a copy of a letter from Volvo signed by Chris Patterson, dated December 1, 1999, providing final notice that Volvo

would terminate the prior dealer sales and service agreement effective March 31, 2000. The reasons given –

MR. WILLIAMS: Your Honor, may we approach the bench? We need to approach the bench and ask him to remove that Exhibit now.

THE COURT: Let's approach the bench.

(The following proceedings were had within the presence and hearing of the jury:)

MR. WILLIAMS: It refers to the complaint. Make sure that I understand this, Your Honor. I may be wrong. I apologize. I thought I saw a reference in here to the complaint that we had filed, that Volvo – but I apologize if it's not there. I just saw the reference to the action being filed. I [497] wanted to make sure that was not in there. I had not seen this until just today. In looking at it now, I think it's okay. I apologize.

THE COURT: I don't think it is okay. It does say that the U S District Court case – oh, I see.

MR. WILLIAMS: It says the Western District. I saw that. That's what alerted me. Same reaction.

THE COURT: Nothing else has been added to this since had our conference here 30 minutes ago?

MR. BYARS: No.

THE COURT: Fine.

(The following proceedings were had within the presence and hearing of the jury:)

THE COURT: Continue, Mr. Byars.

BY MR. BYARS:

Q The reasons given by Volvo for the termination action included the alleged non-performance with regard to various business plan objectives. In response, Reeder-Simco filed a verified complaint with the Arkansas Motor Vehicle Commission contesting the termination action. We are sure your are also aware of the fact that Reeder-Simco later filed a complaint against Volvo in U.S. District Court for the Western District of Arkansas. These actions reflect the various contentions by Reeder-Simco that Volvo has not in the past dealt with Reeder-Simco in good faith and in a commercially-reasonable [498] manner; and that Volvo has engaged in price discrimination in violation of the Robinson-Patman Act. There are a number of facts and circumstances too numerous and detailed to explain in this letter giving rise to the mentioned lawsuits, but we believe one of the major problems stems from the terms of the prior franchise agreement itself. Upon our review of the new proposed franchise agreement, we see the same types of problems and concerns. Nevertheless, we would be willing to consider the execution of the new proposed franchise agreement, provided we can work through our problems and concerns, which will require certain revisions to the proposed franchise agreement. One of the first items of inquiry pertains to fleet sales. In our history as a heavy truck dealer, we have had some significant success with large fleet transactions, particularly prior to our experience with Volvo. The new proposed franchise agreement appears to significantly impair the prospect or opportunity for fleet sales by virtue of paragraph 3.11 entitled direct sales. Secondly, and related to the issue of fleet sales, we need some assurances that Reeder-Simco will receive the same competitive pricing equalization as

Volvo itself and other dealers are able to enjoy in both direct and dealer sales. Next, there are substantial pitfalls and problems with Volvo setting the Portfolio of Criteria and parts and sales objectives on very vague or non-existent guidelines. To this day, we do not know how Volvo makes the determination on the Portfolio of Criteria [499] and objectives, other than a general notion that it is based in part on truck registration data received from a third party publisher known as Polk, and a loose connection with Reeder-Simco's past performance. We have previously discussed the non-reliability and non-reality of the Polk data and Reeder-Simco's AOR. We would be glad to discuss that issue with you in detail. The lack of consistent, objective standards with respect to setting the purchase objectives are also demonstrated in your cover letter. Your letter states that Reeder-Simco's new truck sales objective for the year 2001 will be 523 units, when last year the new truck sales objective set by Volvo was 60 units. You also noted that Reeder-Simco's actual parts sales in the calendar year of 2000 was $272,624, but it's objective was $466,902. The proposed objective for 2001, however, is $334,859. How were these objectives determined? Because the franchise agreement purports to allow Volvo to terminate the new, proposed five-year term upon the failure of Reeder-Simco to meet objectives set by Volvo, we desire to negotiate in good faith the realistic parameters of the objectives for Reeder-Simco in advance of executing the franchise agreement. We also have a number of specific questions and concerns about the language utilized in specific provisions of the proposed agreement. Before addressing each of these items, however, we would like to know if Volvo would be willing to negotiate in good faith various terms of the proposed franchise agreement. If so,

please advise [500] as to a convenient time and place when we can meet and discuss the proposed franchise agreement. Thank you for your consideration and attention to this matter. Sincerely, Reeder-Simco Truck Center, Inc., David Reeder, William Heck, Hershel Cole. After this letter was submitted, has there been any satisfactory resolution of your concerns concerning this new franchise agreement –

A None.

Q – proposed?

A None.

Q Mr. Williams also asked you about the Land O'Frost transaction. And on that transaction your concession quote that you received authority for or an approval was two percent, is that right?

A Yes.

Q I want to refer you to Plaintiff's Exhibit No. 155-A. I want to make sure 155-A has been admitted.

MS. PORTER: Yes.

THE COURT: It's been admitted.

Q All right. Let me show you or refer to the fourth page, I'm sorry, the fifth page in that it says VTNA 3131. These are a little hard to read. But this reflects that a dealer, and by the way, the Land O'Frost quotation had to do with VNL 64 day cabs, didn't it?

A Land O'Frost.

* * *

[504] [Deposition Testimony of Christopher William Patterson, read into the record on January 17, 2002. Located *infra* at JA 406 through JA 419.]

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[521] [Deposition Testimony of Robert David Wright, read into the record on January 17, 2002. Located *infra* at JA 420 through JA 426.]

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[538] [Deposition Testimony of Suzanne Keith Warren, read into the record on January 18, 2002. Located *infra* at JA 427 through JA 430.]

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